Granite Construction Company *and* International Union of Operating Engineers, Local 428, AFL–CIO *and* Laborers' District Council of the State of Arizona including Locals 383 and 479, a/w Laborers' International Union of North America, AFL–CIO *and* Transport Local Delivery and Sales Drivers, Warehousemen and Helpers, Construction, Mining, Motion Picture and Television Production, State of Arizona, Local Union No. 104, a/w International Brotherhood of Teamsters, AFL–CIO

Granite Construction Company *and* International Union of Operating Engineers, Local 428, AFL–CIO, Petitioner *and* Laborers' District Council of the State of Arizona including Locals 383 and 479, a/w Laborers' International Union of North America, AFL–CIO, Petitioner *and* Transport Local Delivery and Sales Drivers, Warehousemen and Helpers, Construction, Mining, Motion Picture and Television Production, State of Arizona, Local Union No. 104, a/w International Brotherhood of Teamsters, AFL–CIO, Petitioner. Cases 28–CA–12629, 28–CA–12633, 28–CA–12660, 28–CA–12651, 28–RC–5256, 28–RC–5257, and 28–RC–5258

November 29, 1999

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On April 12, 1996, Administrative Law Judge Clifford H. Anderson issued the attached decision. The General Counsel filed exceptions, the Respondent filed an answering brief,[1] the General Counsel filed a reply brief, and the Charging Party Operating Engineers filed a reply brief. The Respondent filed exceptions, the General Counsel filed an answering brief, the Charging Party Operating Engineers filed cross exceptions and an answering brief, the Charging Party Teamsters filed exceptions and a brief, and an answering brief, and the Respondent filed briefs in reply to the General Counsel, Operating Engineers, and Teamsters.[2] The Association of General Contractors filed an amicus brief, and the AFL–CIO filed an amicus brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision, Order,[4] and Direction.

This case involves Respondent's relationships with three Unions—Operating Engineers, Teamsters, and Laborers. Each Union represented a construction unit pursuant to Section 8(f) and a nonconstruction unit (rock, sand, and gravel) pursuant to Section 9(a).[5]

The Operating Engineers and the Teamsters struck on July 14. The Laborers honored that strike (beginning July 15) and then struck on their own on July 18. As discussed below, we conclude that all such activity was in breach of no-strike clauses and was unprotected.

Thus, we reach the following conclusions:

1. For the reasons stated by the judge, we agree that the Respondent did not violate Section 8(a)(3) when it discharged Teamsters-represented employees for striking in violation of a no-strike clause;

2. For the reasons stated by the judge, we agree that the Respondent did not violate Section 8(a)(5) and (1) when it withdrew recognition from and refused to bargain with the Teamsters, Operating Engineers and Laborers as representatives of the employees in the construction units;[6]

[1] The Respondent filed a motion to strike certain portions of the General Counsel's brief, and the Laborers and the General Counsel filed a brief opposing this motion. We deny the Respondent's motion to strike.

[2] The Respondent filed a motion to correct the administrative law judge's decision, and the General Counsel filed an opposition to that motion. We deny the Respondent's motion. The Respondent also filed a motion to strike the judge's conclusions with respect to Sec. 8(a)(1). We deny the motion.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[5] The judge found, and we agree, that the three rock, sand and gravel units are not, and have never been, within the building and construction industry as that term is used in Sec. 8(f) of the Act. Therefore, he found that the provisions of Sec. 9(a) governed those bargaining relationships. In a case decided just before the Respondent commenced operations in Arizona, the Board found that, by its terms, the Arizona Rock Products agreement applied "only to bona fide commercial plant operations, and will not be considered as applying to job-site construction, sub-contract plant operations, or the establishment of an operation for the primary purpose of servicing a particular job or project." Based on this, the Board found that the agreement applied primarily to commercial manufacturing operations which *do not* involve "the provision of labor whereby materials and constituent parts may be combined on the building site to form, make or build the structure common to the construction industry." Therefore, the Board found that the bargaining relationships were governed by Sec. 9(a) of the Act. See *Teamsters Local 83 (Various Employers)*, 243 NLRB 328, 332 (1979). Here, the agreements with each of the rock, sand, and gravel units contain identical language limiting the scope of the agreement to bona fide commercial plant operations. We find that the inclusion of this language, combined with the fact of the Board's decision prior to the Respondent commencing operations in Arizona, support the judge's finding that the bargaining relationship between the Respondent and the three rock, sand and gravel units were governed by the provisions of Sec. 9(a) of the Act.

[6] *John Deklewa & Sons*, 282 NLRB 1375 (1987).

3. Contrary to the judge, we find that the Respondent did not violate Section 8(a)(3) and (1) when it discharged Operating Engineers-represented employees who engaged in strike activity on July 14.

4. Contrary to the judge, we find that the Respondent did not violate Section 8(a)(5) and (1) when it withdrew recognition from the Operating Engineers, Teamsters and Laborers in the nonconstruction units.

5. In light of our findings regarding the status of the Operating Engineers' strike, we find that the Laborers represented employees were engaged in unprotected strike activity on July 15 and 18, 1994.[7] Thus, the discharge of the Laborers-represented employees was lawful.

Factual Findings[8]

The facts, as more fully set forth by the judge, are as follows. The contract between the Respondent and the Operating Engineers expired on May 31, 1994. Bargaining began in late May. The Operating Engineers and the Respondent met on July 5 and agreed to extend their contract until the next scheduled meeting on July 11. The Respondent met jointly with the Operating Engineers and the Carpenters on July 11.[9] Sometime in the afternoon, the Carpenters announced that they would not attend further sessions until the differences between the Operating Engineers and the Respondent were worked out. Carpenters Representative Rick Mills agreed to Granite Labor Relations Director Rolleri's request to keep the old contract in place until the next bargaining session with Carpenters, even though another bargaining session had not been scheduled. As to the Operating Engineers, the testimony is at variance.

The Respondent's witnesses testified that, while the Carpenters were leaving, and after their agreement was reached, Rolleri immediately asked Operating Engineers Representative Dennis Teel if he too would agree to keep the Operating Engineers' agreement with the Respondent in place until their next scheduled meeting on July 19. The Respondent's witnesses testified that Teel nodded affirmatively. Teel specifically denied that any such exchange occurred. Other Operating Engineers representatives corroborated his denials. The Carpenters' representative, while not denying that it occurred, testified that the activity associated with their departure might have caused them not to hear Rolleri's question to Teel.

On the afternoon of July 13, the Operating Engineers representative, Dennis Teel, informed the Laborers representative, Emilio Torres, of Teel's decision to take the Operating Engineers out on strike. Operating Engineers Representative Teel contacted his counsel and obtained the language of a letter to send to the Respondent. At the end of the workday on July 13, the Operating Engineers sent a letter by facsimile to Granite "terminating the oral agreement to extend the contract effective July 14, 1994." Teel signed the letter on behalf of the Operating Engineers. (The Teamsters sent a similar letter by fax on the same day.)

On July 14, the Operating Engineers and the Teamsters commenced an economic strike against the Respondent. On July 15, the Laborers sent the Respondent a letter by facsimile asserting that they were not engaging in an economic strike at that time. At the end of the working day on July 15, the Respondent decided to fire all striking employees represented by the Operating Engineers and the Teamsters. It fired 73 employees represented by the Operating Engineers and 41 employees represented by the Teamsters. The discharge letters stated that each employee was being discharged for engaging in improper strike activity prohibited by the contract. At the same time, 14 members of the Laborers-represented units were discharged for honoring the picket line. Over the weekend, the wording on the Operating Engineers' and Teamsters' picket signs was changed to protest the Respondent's "unfair labor practice."

On the morning of July 18, the Laborers commenced a strike against the Respondent, picketing its operations with signs that proclaimed an unfair labor practice strike against the Respondent. As Laborers-represented employees were identified by the Respondent as participating in the strike, or refusing to go to work because of the picket line, they were terminated for participating in the strike. Ten Laborers-represented employees were discharged between July 18 and 25. In all, 24 Laborers-represented employees were ultimately discharged.

The Laborers' contract, which included a no-strike clause barring economic or sympathy strikes, had been extended until the next scheduled bargaining session on July 26. The Respondent and the Laborers' representative met at the scheduled bargaining session on July 26. At that time the Respondent distributed a letter indicating that the contracts had been in effect up to the scheduled bargaining session and that strike activity before that time was in violation of the agreements. The letters announced that the contracts were expired, were not to be extended further, and that the Respondent repudiated the expired agreement and the existing bargaining relationship.[10]

[7] All dates are in 1994 unless noted otherwise.

[8] Elections in each of the construction units were conducted on December 9, 1994, pursuant to a Stipulated Election Agreement. In each unit challenged ballots were determinative of the results. The hearing on challenged ballots was consolidated with the hearing on the unfair labor practice complaints. Based on our findings in this decision, we have set forth, infra, in our Direction, the ballots to be counted to determine the results of the elections.

[9] Although the Carpenters Union was negotiating with Respondent during these events, it is not a party to this case.

[10] The Respondent had distributed similar letters to the Teamsters and the Operating Engineers on July 19 and 25, respectively.

Administrative Law Judge's Decision

The judge found that the Operating Engineers' strike was lawful, that the discharge of the striking Operating Engineers-represented employees who participated in the strike on July 15 was unlawful, and that the Engineers' strike was converted to an unfair labor practice strike at that point. The judge found that each of the witnesses testified honestly as to what he recalled regarding the discussions at the bargaining table on July 11. However, he found that the testimony did not clearly establish that the Operating Engineers agreed at the July 11 meeting to extend their agreement to the next scheduled bargaining session. The judge further explained that "Teel's downward look and nod of his head occurring thereafter, as again described by Haworth and Rolleri, were not in response to the unheard extension question, but rather some other circumstance not recalled by any witness nor otherwise identified on this record." The question was asked, as the Respondent's agents testified, but it was not heard. In the confusion of the moment, a misunderstanding occurred. In sum, the judge found that the Operating Engineers bargainers did not believe that they had agreed to extend the contract before they went on strike.

The judge also found that the Laborers' contract included a no-strike clause barring economic or sympathy strikes, and that it had been extended until the next scheduled bargaining session on July 26. He further found that a substantial number of Laborers-represented employees honored the Operating Engineers strike. Since that strike did not become an unfair labor practice strike until the discharge of the Operating Engineers-represented employees, which discharge occurred simultaneously with the discharge of the Laborers, the judge found that the discharge of the employees in the Operating Engineers units could not have influenced the decisions of the Laborers-represented employees to honor the picket line on July 15. The judge found that the 14 Laborers-represented employees who withheld their services on July 15 while their contract with its no-strike clause was still in effect were lawfully discharged for doing so.

The judge further noted that, on July 18, the Laborers Union called a strike. Between July 18 and 25, Laborers-represented employees participating in the strike were discharged. Since the Laborers' contract was still in effect with its prohibition of economic and sympathy strikes, the judge sought to determine whether the strike was caused in part by the unlawful discharge of the Operating Engineers, thereby making it an unfair labor practice strike. *Gaywood Mfg Co.,* 299 NLRB 697 (1990). The judge found, based on a history of collaborative bargaining, close working circumstances and mutual aid and support, that the discharge of the 73 Operating Engineers-represented employees was a factor in the Laborers' initiating their strike on July 18, and in the Laborers-represented employees honoring the strike thereafter. Therefore, the judge found that the Laborers strike beginning on July 18 was an unfair labor practice strike from its inception, that the Laborers-represented employees were unfair labor practice strikers, and that the contract limits on economic and sympathy strikes did not apply to those employees who struck in protest of the Respondent's unfair labor practices.

Exceptions

The Respondent excepts, inter alia, to the judge's finding that the Operating Engineers' contract was not extended. It contends that the documentary and testimonial evidence supports its contention that the Operating Engineers' agreement remained in effect through July 19, 1994, the date of the next scheduled meeting. Specifically, the Respondent contends that Teel agreed at the July 11 meeting to extend the Operating Engineers' contract, and that the July 13 letter to the Respondent advising it that the Operating Engineers were going out on strike contains an admission that lends support to that contention. The Respondent argues that the language in Teel's July 13 letter "terminating the oral agreement to extend the contract" indicates that there had been an agreement. Moreover, by stating in the letter that it was "effective 7/14/94" it implied that when the letter was sent there was an agreement in place.

Analysis

We find merit in the Respondent's exception and its contention that the Operating Engineers' contract with its no-strike clause was in effect at the time of the strike. In light of the variation in the parties' testimony, it is critical that we examine the documentary evidence to shed light on what the parties believed they had agreed to at the July 11 bargaining session. We agree with the Respondent that the judge erred in failing to recognize that the Operating Engineers' July 13 letter to the Respondent contained an admission that there had been an oral agreement to extend the Operators' contract. The letter, sent by facsimile on July 13, stated:

> This is to inform you that, because we are not making any progress on finalizing our collective bargaining agreement, Local 428 [of the Operating Engineers] is terminating the oral agreement to extend the contract, effective July 14, 1994.

Although the judge acknowledged the existence of the letter, he accorded it no weight in light of his findings that the Operating Engineers' witnesses had testified honestly to what they recalled. We find that the judge erred in failing to accord weight to the Operating Engineers' admission in the letter. We further find that that admission clearly supports the testimony of the Respondent's witnesses—which the judge also credited in making what he acknowledged were Solomonic credibility resolutions—that, after obtaining the Carpenters' agree-

ment to extend their contract, Respondent's representative, Rolleri, specifically asked Operating Engineers Representative Teel if he too would agree to extend their old contract and that they observed Teel nodding affirmatively.[11] We therefore reverse the judge and find that there was an oral agreement to extend the Operating Engineers' contract until the next bargaining session on July 19.[12]

As we have found that the Operating Engineers' contract with its no-strike provision was in effect, we find that the strike activity was unprotected and the discharges were not in violation of Section 8(a)(3) and (1) of the Act. Accordingly, we reverse the judge's finding of a violation. We further find that the Operating Engineers' rock, sand, and gravel unit, which was governed by Section 9(a) of the Act, was substantially depleted by the discharges and that the Respondent was therefore entitled to withdraw recognition and refuse to bargain. Consequently, we also reverse the judge's finding of an 8(a)(5) and (1) violation. *Marathon Electric*, 106 NLRB 1171 (1953).[13]

We have found that the Operating Engineers engaged in unprotected strike activity, and that the Respondent did not violate Section 8(a)(3) and (1) when it discharged those striking employees. Consequently the Laborers' strike, which the judge found was motivated in part by the discharge of the Operating Engineers, is also unprotected. That is, there was a no-strike clause in effect, and the strike was not an unfair labor practice strike. Accordingly, we reverse the judge's finding that the Respondent violated Section 8(a)(3) and (1) when it discharged Laborer represented employees for engaging in strike activity. We further find that the Laborers' rock, sand and gravel unit, which was governed by Section 9(a) of the Act, was substantially depleted by the discharges and that the Respondent was entitled to withdraw recognition and refuse to bargain. Accordingly, we reverse the judge's finding of an 8(a)(5) and (1) violation.

Similarly, as noted earlier, we adopt the judge's findings that the Respondent did not violate the Act by discharging Teamsters-represented employees who struck in violation of a no-strike clause. The Respondent also did not violate the Act by withdrawing recognition of the Teamsters in the rock, sand and gravel units since that unit was substantially depleted by the discharges.

The complaint also alleged multiple violations of Section 8(a)(1) of the Act. According to the judge, the allegations involved essentially three classes of conduct—threats of discharge if the employees did not abandon the strike and return to work; statements that the unions were out and would never get back in the workplace; and inducements to return to work. The judge explained that the conduct at issue is permissible or impermissible depending on the protected character of the strikes involved and the nature of the Respondent's bargaining obligations. The judge found that the Respondent violated the Act by making these statements. Consistent with our findings that the striking employees represented by the Operating Engineers, Laborers, and Teamsters engaged in unprotected conduct, we conclude that the statements were lawful.

As we have not found merit in any allegation of the complaint, we order the complaint dismissed.

ORDER

The complaint is dismissed.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 28 shall, within 14 days from the date of this Decision, Order and Direction, open and count the ballots of the individuals listed below. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

Teamsters Unit Case 28–RC–5256:

Barton, Bryan	Briggs, Jimmy
Burney, William	Byron, Christopher
Corrales, Joe	Figueroa, Henry
Freyenhagen, Lee	Gauthier, Richard
Gilmore, Martin	Lender, Dennis
Linegar, Larry	Martinez, Ramon
McCan, Lawrence	Montoya, Quirino
Moreno, Robert	Mosier, Thomas W. III
Nelson, Christen	Ramon, William
Shumaker, Mark	Sipe, James

[11] We find that the letter, which was sent 2 days after the alleged oral agreement was made, speaks for itself and cannot be minimized simply by concluding, as the judge did here, that the Operating Engineers' witnesses subsequently testified honestly as to what they believed occurred. See *Royal Motor Sales*, 329 NLRB 760 3 fn. 10 (1999) (citing *Island Creek Coal Co*., 292 NLRB 480, 488–489 (1989), enfd. mem. 899 F.2d 1222 (6th Cir. 1990) (judge's conclusion that witness lied about reasons for information request not determinative in light of documentary and other undisputed evidence)).

[12] Member Hurtgen notes that there is testimony that Teel's affirmative nod was in response to a different matter. In light of the July 13 letter, Member Hurtgen is skeptical about that testimony. However, even crediting that testimony, Member Hurtgen would reach the same result. That is, if Teel failed to respond to the suggestion of contract extension, that silence would be especially troublesome in light of the judge's finding that there was a pattern in earlier bargaining sessions of discussing extensions and new meeting dates at each bargaining session. He notes that there is no dispute that the Carpenters reached an extension agreement and that Teel heard them do so. Further, the judge found that Rolleri attempted to reach an agreement with the Operating Engineers. Teel testified that the subject of extensions and new meeting dates came up at the end of meetings. If, at this point in the bargaining, Teel did not wish to maintain the status quo, he should have made his position clear to the Respondent. In circumstances such as these, Member Hurtgen would place the burden on the party seeking to change the status quo to put the other party on notice. He would find that in this instance, the Operating Engineers did not meet their burden.

[13] As noted above, the construction units were governed by Sec. 8(f), and thus withdrawal of recognition in those units was clearly lawful, even apart from *Marathon,* supra.

Stalcup, Raymond
Taylor, Charles
Wilson, James

Further, if necessary, the Regional Director shall investigate and determine the eligibility of Messrs. Ron Dennee and James Michaels.

Operating Engineers Construction Unit Case 28–RC–5257:

Abeyta, Ernesto
Anderson, Cleo
Bejarano, Ray
Borquez, Francisco
Bray, Greg
Broquez,Victor
Canady, William
Carroll, Charles
Castano, Ernest
Clark, Douglas
Cole, Stewart
Crowe, Scott
Daugherty, Charles
Dodemont, Shayne
Fenn, Jason
Finch, Michael
Garcia, Richard
Henry, George III
Glomski, Thomas
Granillo, Ernie
Guerro, Juan Jose
Herbert, David
Hernandez, Juan or John S
Housler, Chad
Howard, William
Hughes, James
Jackson, Robert
Jackson, Charles
Jacobs, Rufus
Johnson, Chester
Bowman, Bernard
Bernal, Frederico
Johnson, Walter
Keith, Marion
Kirkendall, David
Mackey, Robert
Minor, Steve
Moran, John
Moss, Brian
Nelson, Steven
Ochoa, Manuel
Paugh, Daniel
Powell, Ray
Pursley, Debra
Roe, Charles
Rose, Robert
Rossen, Frank
Shew, Michael
Sibley, Richard
Simmons, Stanley
Stock, Gary
Storm, George
Sturgis, Douglas
Turner, Kevin
Urschel, Charles
Wagner, Jim
Watson, Earl
Weber, John
Werland, David
Wetterstorm, Mark
Wilharm, Clinton
Wofford, Bill

Investigate and determine the eligibility of the following voters in the event the opening of the ballots found eligible is not determinative of the election:

Garrett, Donald
Hiltunen, Louis
Lincoln, Richard
Sarrah, Kevin
Weller, Fred
White, Larry

Laborers' Construction Unit Case 28–RC–5258:

Broughton, John
Gonzales, Enrique
Dekens, Bryan
Gradillas, Endurado
Green, Ronald
Hernandez, Tony
Lee, Jacob
Newman, Paul
Olivas, Miguel
Sharp, Leroy
Tellez, Alredo
Zilko, Mike
Hawkins, Logan
Huff, Chad
Major, Rex
Nikitas, Angelo
Rau, Mardy
Turgis, Chad
Urbina, Jesus

Buckner, Roy
Escamillas, Jess
Gonzales, Joe
Granillo, Guillermo
Gresham, Jimmy
Jarvis, Justin
Van Alstine, Ron
Diggins, Daniel
Esquivel, Hector M. Jr.
Esquivel, Hector M. Sr.
Pachero,Richard
Dojaque, Zeferino B.
Padilla, Adalberto

As necessary, investigate and determine the eligibility of Daniel S. Diaz and Ronnie Diaz.

Lewis S. Harris, Esq. and *Richard H. Smith* and *Peter N. Mydanis*, *Esqs*., for the General Counsel.
Richard K. Walker and *Thomas D. Arn, Esqs. (Streich Lang),* of Phoenix, Arizona, for the Respondent/Employer.
Michael J. Keenan, Esq. (Ward, Keenan & Barett), of Phoenix, Arizona, for the Charging Party/Petitioner, Operating Engineers.
Barry E. Hinkle, Esq. (Van Bourg, Weinburg, Roger & Rosenfeld), of Oakland, California, for the Charging Party/Petitioner, Laborers.
Stanley Lubin, Esq., of Phoenix, Arizona, for Charging the Party/Petitioner, Teamsters.

DECISION AND REPORT ON CHALLENGED BALLOTS

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard the above-captioned cases in Phoenix, Arizona, in 25 days of trial extending from May through September 1995. The matter arose as follows

I. THE UNFAIR LABOR PRACTICE CASES

On July 15, 1994, the International Union of Operating Engineers Local 428, AFL–CIO (the Charging Party Operating Engineers, the Petitioner Operating Engineers, the Operating Engineers or the Operators) filed a charge with Region 28 of the National Labor Relations Board (the Region) docketed as Case 28–CA–12629 against Granite Construction Company (the Respondent or the Employer). The charge was amended on October 31, 1994.

On July 15, 1994 the Laborers' District Council for the State of Arizona including Locals 383 and 479, affiliated with the Laborers' International Union of North America, AFL–CIO (the Charging Party Laborers, the Petitioner Laborers or the Laborers) filed a charge with the Region, docketed as Case 28–CA–12633, against the Respondent and, on July 27, 1994, filed a second charge with the Region, docketed as Case 28–CA–12660, against the Respondent. The charge in Case 28–CA–12660 was amended on October 31, 1994.

On July 22, 1994, the Transport, Local Delivery and Sales Drivers, Warehousemen and Helpers, Construction, Mining, Motion Picture and Television Production, State of Arizona, Local No. 104, an affiliate of the International Brotherhood of Teamsters, AFL–CIO (the Charging Party Teamsters, the Petitioner Teamsters, or the Teamsters and, collectively with the Operators and the Laborers, the Charging Parties or the Unions) filed a charge with the Region docketed as Case 28–CA–12651 against the Respondent. The charge was amended on October 31, 1994.

On August 31, 1994 the Regional Director for Region 28 (the Regional Director) issued an order consolidating cases, consolidated complaint and notice of hearing respecting the above-captioned unfair labor practice cases. The consolidated complaint was amended on December 2, 1994, and at various times during the hearing. The Respondent filed timely answers to the complaint and amended complaints.

Briefly, the consolidated complaint as amended alleges four categories of conduct. First, the complaint alleges that the Respondent had long recognized the Unions as individual exclusive representatives of six bargaining units—a rock, sand and gravel employees unit and a construction employees unit for each Charging Party—pursuant to Section 9(a) of the National Labor Relations Act (the Act), the Respondent withdrew recognition of each Union respecting its represented units and thereafter failed and refused to recognize and bargain with each Union respecting those units; thereafter unilaterally changing terms and conditions employment of unit employees without resuming recognition and bargaining. The complaint alleges that the Respondent's actions in so doing violated Section 8(a)(5) and (1) of the Act.

Second, the complaint alleges that the Operators and the Teamsters commenced an economic strike against the Respondent on or about July 14, 1994. The complaint alleges that on July 18, 1994, the Laborers commenced an unfair labor practice strike against the Respondent and the economic strikes of the Operators and the Teamsters were converted to unfair labor practice strikes in consequence of the unfair labor practices of the Respondent.

Third, the complaint alleges that on and after July 15, 1994, the Respondent terminated striking employees and other employees who honored the picket lines in violation of Section 8(a)(3) and (1) of the Act. Fourth and finally, the complaint alleges a host of incidents in which various agents of the Respondent made statements to employees violative of Section 8(a)(1) and in some cases 8(a)(5) of the Act.

The Respondent admits that it had long recognized and bargained with the Unions with respect to certain bargaining units, that it withdrew that recognition and thereafter refused to bargain with the Unions respecting its employees. It argues, however, that it was legally privileged to withdraw recognition and had no obligation to continue or resume bargaining, so that its conduct was at no time in violation of Section 8(a)(5) of the Act.

The Respondent admits that it discharged certain of its employees for going on strike and/or supporting the strikes of the Teamsters, the Operating Engineers and the Laborers. It alleges further, however, that the strikes were at all times illegal strikes undertaken in contravention of valid no-strike provisions of current collective-bargaining agreements. The Respondent avers that employees' conduct in joining these illegal strikes was not protected under the Act and therefore the employees' discharges in consequence thereof were not in violation of Section 8(a)(3) and (1) of the Act. Finally Respondent denies that the various allegations of conversations in violation of Section 8(a)(1) and Section 8(a)(5) of the Act occurred as alleged in the complaint or, in all events, violated the Act.

II. THE REPRESENTATION CASES

On July 22, 1994, the Teamsters filed a petition with the Region, docketed as Case 28–RC–5256, seeking an election in a unit of all drivers and truck mechanics and their apprentices in the Respondent's construction operations in the State of Arizona. On July 26, 1994, the Operators filed a petition with the Region, docketed as Case 28–RC–5257, seeking an election in a unit of all equipment operators, servicemen, grade checkers, heavy equipment mechanics and their apprentices employed in the Respondent's construction operations in the State of Arizona. On August 15, 1994, the Laborers filed a petition with the Region, docketed as Case 28–RC–5258, seeking an election in a unit of all laborers in the Respondent's construction operations in the State of Arizona.

The parties entered into Stipulated Election Agreements approved by the Regional Director on November 9, 1994. Elections in each unit were conducted on December 9, 1994. In each unit a very substantial number of challenged ballots were determinative of the results of the election.

On January 9, 1995, the Regional Director issued an order directing hearing on challenged ballots, consolidated cases and notice of hearing. The Order held that the challenged ballots raised substantial issues of fact and credibility best resolved by a hearing. The designated hearing officer was directed to hold a hearing for purposes of resolving the challenges and thereafter to "prepare and cause to be served upon the parties a report containing resolutions of credibility of witnesses, findings of fact and recommendations to the National Labor Relations Board as to the disposition of the challenges." Finally, the Order directed that the hearing on challenged ballots be consolidated with the hearing on the consolidated unfair labor practice complaints described above.

FINDINGS OF FACT

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence,[1] to call, examine, and

[1] Two separate disputes arose during the trial respecting Federal Mediation and Conciliation Service Mediator Peter Cinquemani. The Respondent subpoenaed Mr. Cinquemani, the Federal Mediation and Conciliation Service moved to quash the subpoena and I granted the motion based on current Board doctrine that mediators may not be required to appear and give testimony in Board unfair labor practice trials respecting their actions as mediators. Thereafter, the Respondent adduced evidence respecting what was said by Mr. Cinquemani in conversations with the Respondent's agents in the course of bargaining. The General Counsel and the Charging Parties objected to any evidence of what Mr. Cinquemani said on the same grounds offered in support of the ruling quashing the subpoena of the FMCS agent. They argued in effect that. if it was proper to quash a subpoena directed to a mediator, it should also be proper to sustain a timely objection to receipt of evidence respecting what he said or did in negotiation.

I ruled and reaffirm here my belief that the Board and court cases addressing the subpoena or other compelled trial attendance testimony of a FMCS Mediators are explicitly limited in their reach and rationale to the question of whether or not the physical presence and testimony of a Mediator may be compelled. The cases do not address whether or not other evidence of a Mediator's words and actions may be received into evidence if otherwise relevant. In the instant case Mr. Haworth testi-

cross-examine witnesses, to argue orally, and to file posthearing briefs.

Upon the entire record[2] herein, including helpful briefs from the General Counsel, the Charging Party Teamsters,[3] the Charging Party Operating Engineers and the Respondent, and from my observation of the witnesses and their demeanor, I make the following findings of fact.[4]

I. JURISDICTION

The Respondent is a California State corporation with an office and place of business in Tucson and other places in the State of Arizona where it is engaged in general heavy and highway construction and in the production and sale of rock, sand and gravel, and other aggregate products. The Respondent in the course and conduct of its business operations annually enjoys revenues in excess of $500,000 and during the same period purchases and receives in interstate commerce at its Arizona places of business, goods and materials valued in excess of $ 50,000 from points outside the State.

The complaint alleges, the answer admits, and I find that the Respondent is now and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

At all times material, the International Union of Operating Engineers Local 428, AFL–CIO, has been a labor organization within the meaning of Section 2(5) of the Act.

At all times material, the Laborers' District Council for the State of Arizona including Locals 383 and 479, affiliated with the Laborers' International Union of North America, AFL–CIO, has been a labor organization within the meaning of Section 2(5) of the Act.

At all times material, the Transport, Local Delivery and Sales Drivers, Warehousemen and Helpers, Construction, Mining, Motion Picture and Television Production, State of Arizona, Local No. 104, an affiliate of the International Brotherhood of Teamsters, AFL–CIO has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

A. Events

1. Background

The Respondent is a California corporation engaged in general heavy and highway construction in various States with its headquarters in Watsonville, California. In 1980 the Respondent established its Arizona branch in Tucson, Arizona, and has since that time operated within Arizona as a construction contractor and as a producer of rock, sand, gravel, and other materials used in the construction industry. The events in controversy herein deal exclusively with the Respondent's Arizona operations.

Dwight (Ted) Haworth Jr. has been the Respondent's Arizona branch manager since 1987. At relevant times, collective-bargaining negotiations for the Arizona operation were conducted by the branch manager and the Respondent's Watsonville, California headquarters based labor relations manager. During the 1994 negotiations, the Labor Relations Manager was Thomas Rolleri.

The Respondent commenced its Arizona operations in May 1980 by acquiring the assets of an existing entity, New Pueblo Constructors, including its real property, gravel pits, permits, heavy construction equipment, plant equipment and rolling stock. The Respondent since that time has continuously been engaged in the business of heavy and highway construction contracting and the production of rock, sand, and gravel within the State of Arizona.

At the time of its start up in Arizona, the Respondent recognized the Unions herein as representatives of the relevant craft employees in separate bargaining units for its rock, sand, and gravel (sometimes referred to as plant) operations and its construction operations. As part of this process in 1980 the Respondent joined and assigned its negotiating rights to the Arizona Building Chapter of the Associated General Contractors, an association representing employers in the construction industry, and adopted the then current Master Labor Agreement

---

fied to a conversation with Mr. Cinquemani. Absent clear Board authority on the issue, I ruled it was inappropriate to create or apply a new privilege which, as all privileges must, acts to deprive the parties of the right to introduce otherwise relevant evidence at trial. No contrary authority having been advanced on brief, I reaffirm my ruling here. If a party seeks to create a new evidentiary privilege in Board proceedings, the party must first convince the Board. The role of a judge is to follow the law not make it.

The testimony of Haworth respecting what Cinquemani said, while not rejected on the basis of the argued privilege discussed supra, remains subject to the normal limitations on hearsay set forth in the Federal Rules of Evidence. Hearsay objections were also advanced and argued by the Charging Parties regarding Haworth's attributions. I have reviewed the testimony and find no exception under the rules of evidence to receive what Haworth claimed Cinquemani said to the Respondent's agent at a meeting on July 19 for the truth of the events on July 11. Thus, although the statements attributed to Cinquemani occurring on July 19 include the statement that he had been surprised by the events occurring on July 11, such an assertion does not qualify the statement as a present sense impression or excited utterance exception to the hearsay rule under Federal Rules of Evidence 803(1) or (2). Further I do not find Federal Rules of Evidence catchall sections 803(24) or 804(b)(5) applicable to Cinquemani's remarks. Accordingly, I have limited the use of Haworth's testimony respecting Cinquemani's statements.

[2] The record was corrected in part by an earlier order in response to various parties' motions. Thereafter the parties requested that the court reporters certifiy certain additional changes to the record which corrections the parties by joint motion moved thereafter that I adopt. That latter motion is granted.

The record, particularly respecting the spelling of the names of numerous employees and challenged voters, was sadly variant. Differences in the spelling of individuals' names between the Regional Director's Order Directing Hearing on Challenges, the parties' stipulations and the Respondent's payroll records have generally been reconciled in favor of the payroll records to the extent those records provide full names and, where necessary, in favor of the spellings used in the stipulations of the parties.

[3] The General Counsel moved that a portion of the Charging Party Teamsters' brief be struck as an improvident and immaterial attack on counsel in the litigation. The Charging Party Teamsters' opposed the motion on the grounds that its argument in its brief was relevant to and offered in support of its motion for an award of litigation expenses. Based on the limited theory of relevance proffered by the Charging Party Teamsters the motion to strike is denied.

[4] As a result of the pleadings and the stipulations of counsel at the trial, the parties substantially reduced the disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible testimonial or documentary evidence. Based on the record as a whole and the results on the merits set forth below, the motions for costs and fees made during the litigation are denied.

of the Arizona Building Chapter of the Associated General Contractors which applied to its construction units. The Respondent also joined the Arizona Rock Products Association and adopted its labor agreements applicable to the Unions' crafts in the plant operations. In 1982 the Respondent withdrew from the multiemployer associations and at all times thereafter bargained on its own behalf with each of the Unions respecting their craft employees in separate construction and plant units.

From its 1980 inception in Arizona, to the events in controversy herein, the Respondent and the Unions maintained continuous relations respecting the three pairs of bargaining units represented by each Union with each Union negotiating a series of contract pairs covering plant and construction work with Respondent. Thus six bargaining units, a separate rock, sand and gravel unit and a separate construction unit for each craft represented by the three Charging Parties, were covered by a series of individual unit collective-bargaining agreements from 1980 until the final contracts' expiration in 1994.

2. 1994 collective bargaining[5]

a. Overview

The six collective-bargaining agreements between the Charging Parties and the Respondent by their terms expired on May 31, 1994. Each of the agreements provided that there would be no strikes, picketing, work stoppages, slowdowns, or other disruptive activity for any reason by the Unions. They also provided that employees involved in such activities would be subject to discharge.

Also expiring at that time was a collective-bargaining agreement between the Respondent and the Arizona Carpenters District Council (the Carpenters) covering a single unit of the Respondent's carpenter construction employees. A series of collective-bargaining negotiations between the Respondent and the signatory unions involving both individual sessions with particular labor organizations and group sessions involving two or more unions were conducted in the months of May through July 1994 respecting these seven bargaining units.

Haworth and Rolleri represented the Respondent and the individual unions were represented by their own personnel. The Charging Party Operators were represented by Dennis Teel, business manager, and Representatives Don Ferguson and Henry Montaño. The Charging Party Teamsters were represented by Business Representative Robert (Bob) Jones and Steward Robert Wilson. The Charging Party Laborers were represented by Representatives Rene Torres and Ermilio Torres. The Carpenters were represented by Secretary/Treasurer Rick Mills, Local 408 President and Business Representative Bill Martin, and Don Fornear. A Federal Mediation and Conciliation Service Mediator, Peter Cinquemani Jr., attended final sessions.

Not all individuals were present at every bargaining meeting. Notes of the sessions were taken by various individuals with varying degrees of completeness. Substantial testimony as well as various bargainers' notes and affidavits describing the sessions was received into evidence. The sessions generally, with special focus on the discussions and agreements respecting contract extensions, were closely litigated.

[5] All dates hereinafter refer to 1994 unless otherwise indicated.

b. Initial sessions

Approximately six bargaining sessions were held in May before the contracts expired by their terms. Ted Haworth testified that in the initial sessions, discussions were held respecting procedural rules for the negotiations, but that that status of the contracts beyond their May 31 facial expiration date was not discussed until that date approached. At that time, Haworth recalled, there "was an agreement to extend, a general agreement, that if we schedule a new negotiating session the predecessor agreement would stay in effect until that negotiating session." Haworth's bargaining notes do not make mention of this agreement, but he testified that his notes were sketchy and he did not write down all that occurred.

Tom Rolleri testified that in the last bargaining session in May, attended by the Operating Engineers and the Carpenters, there was an:

> agreement by the parties to continue the agreements in effect beyond their scheduled expiration date from one negotiation session to the next scheduled negotiation session automatically. Or actually through the next negotiation session.

He testified that he asked for the same agreement from each of the other crafts at their last bargaining session in May because "we wanted to have continuation of the agreement during the pendency of negotiations." Rolleri specifically testified that each Union agreed to such a procedure.[6]

Don Feguson denied that a blanket automatic extension procedure was either discussed or agreed to, but that in later sessions specific agreements to extend the contract to the next session were made. Dennis Teel testified that discussion of contract extension occurred on May 24 or 25. He testified:

> We basically came out of the discussions with the—the understanding that at the end, if it did go past expiration date that we would, you know—we had the understanding that we would acknowledge orally to one another if we wanted to extend the agreement.

Teel recalled that a proposal was made to automatically extend the agreement, but that he preferred to keep his options open and therefore did not agree to do so automatically. He testified that "my position was that if at the end of a meeting we agreed with the other side and acknowledged to one another which was the case, then we would extend it to the next meeting.

Rene Torres testified that the Laborers reached agreement with the Respondent at the bargaining session on May 24 to extend the collective bargaining agreement. He initially answered a question of counsel for the Charging Party Laborers:

> Q. Did the Laborers agree with Granite Construction that as long as the next negotiation session was set at the end of any negotiating session, that the agreement would remain in full force and effect?
>
> A. Yes.

Torres subsequently testified that the old agreement was extended until a new agreement was reached. At that point in his testimony he specifically recalled that this broader extension

[6] Rolleri identified Bob Jones as the agent who agreed to this procedure on behalf of the Teamsters, Dennis Teel on behalf of the Operating Engineers, Rick Mills for the Carpenters, and Ermilo Torres for the Laborers.

agreement was reached as opposed to one limited to a meeting to meeting extension.

Bob Jones recalled that before the contract expired:

> we discussed what was going to happen after the 31st [of May], and I told them that we would agree to continue working on a day-to-day basis, and that I would not personally take any action on behalf of the Teamsters for work stoppage without notifying them.

Jones identified this as an agreement to a "day-to-day extension." He specifically denied that the Teamsters' extension agreement was on a bargaining meeting to bargaining meeting basis. Indeed he testified he did not have the authority to enter into such an agreement respecting the Respondent and that he would never make such an agreement without the requisite authority. He testified that it was a practice with the Teamsters to enter into a longer extension agreement than day to day only with employers who agree to apply the new agreement retroactively and that such an agreement had never been forthcoming from the Respondent. He testified further that he had a discussion with his superior at the time, Terry Moser, respecting contract extensions in the negotiations with the Respondent and after discussing the fact that the Respondent would not commit to a retroactive application of any new agreement, Moser gave him only the limited authority to extend the contract on a day by day basis, as described above.

Martin testified that the Carpenter's essentially automatically agree in most negotiations to extend the expiring contract until a new agreement is reached and did so in the instant negotiations. He corroborated Jones' denials that any agreement was entered into by the Teamsters to extend the contract from one bargaining to the date of the next scheduled session.

The various bargaining notes of the sessions contain no reference to extension discussion until the June 9 bargaining session.[7] Rolleri's notes for that session refer to extending the agreements from "meeting to meeting." Bill Martin's notes describe an exchange between Teel and Rolleri during the June 9 session:

> D.T. Can we go meeting to meeting
> T.R. Until notice is given?
> D.T. We need to understand
> T.R. The current agreement that has expired
> we'll work under the agreement from meeting to meeting

Martin testified that these entries in his notes reflected an exchange respecting extension of the contract on a meeting to meeting basis. He further testified Teel agreed to such an extension.

c. Later sessions

Bargaining continued through June and into the first part of July. Respondent's agents Rolleri and Haworth testified that as bargaining progressed during this period, there were rumors of a possible strike which caused them to seek specific confirmation from the Unions at each bargaining session that the relevant contract would be extended to the next bargaining session. Union Agents Teel, Ferguson, Martin, and Jones testified that while some extensions were discussed and agreed to at some meetings, this was sporadically rather than consistently done.

A bargaining session was held on July 5 attended by the Respondent, the Carpenters and the Operating Engineers. Rolleri testified that at the session the bargainers agreed to hold the next bargaining session on July 11 and he asked: "Do we still have agreement to keep the agreement in effect from one negotiation session through the next scheduled negotiation session[?]" and that Teel and Mills on behalf of their organizations each responded with an affirmative "yes." Haworth corroborated Rolleri's testimony of such an exchange at the end of the meeting.

Bill Martin's notes and testimony indicate that on July 5, after Rolleri proposed a new bargaining session on July 11 and after the date and time were confirmed by the bargainers, the following exchange took place:

> Tom Rolleri says, "Okay, status quo until then." Dennis Teel says, "Yes." Tom Rolleri says, "We'll keep the agreement we've got in place." And, Dennis Teel says, "Yes." Rick Mills says, "Yes."

A bargaining session was held on July 6 attended by the Respondent represented by Haworth and Rolleri and the Teamsters represented by Jones and Wilson. Rolleri testified that due to Jones' vacation commitments, the parties agreed to hold their next bargaining session on July 25. Rolleri testified he "asked Bob Jones if he continued to agree to keep the agreement in effect through our next regularly—through our next agreed upon negotiation date" and that Jones so agreed. Haworth recalled Rolleri "taking the lead" by asking Jones: "And the old agreement is extended until the next meeting; is that correct," and further recalled that Jones answered: "yes." Haworth testified that an additional reason for raising the issue of contract extension with the Teamsters on July 6 was the relatively substantial period of time which was to pass until the next scheduled bargaining session on July 25.

Jones testified that no discussion was held at the July 6 meeting respecting a contract extension beyond the day to day extension that had been agreed upon earlier. Bob Wilson testified: "Well, I think Bob Jones, you know, as we brought up, Bob Jones asked for an extension, you know, what we were working on a day-to-day contract. And it was agreed."

A bargaining session was held between Respondents and the Laborers on July 8. There is no dispute that an agreement was reached at that session keeping the agreement in place until the next negotiation session to be held on July 11.

The earlier scheduled bargaining session was held on July 11 starting at 10 a.m. attended by the Respondent represented by Haworth, and Rolleri, the Carpenters represented by Mills, Martin, and Fornear and, the Operating Engineers represented by Teel, Montaño, and Ferguson. Also present was Federal Mediator Peter Cinquemani. The negotiators at his session were aware that there was to be a second session that day between the Laborers and the Respondent scheduled for 4 p.m.

Martin, one of whose duties for the Carpenter's was to take careful notes of the sessions, took notes of the July 11 session. The notes indicate that in the afternoon Mills told the others that the Carpenters' negotiators had been given "marching orders" by their governing body because there were only two Carpenters' represented employees involved in the negotiations, that insufficient progress was being made and that the Carpenter's-representatives were "wasting our time here."

[7] The June 9 session was apparently a session with the Carpenters and Operating Engineers, but Jones for the Teamsters was also in attendance. Jones testified that he attempted to attend as many Operating Engineers bargaining sessions as he could during the negotiations.

Mills suggested the Carpenters should "abstain" from attending further bargaining sessions until the differences between the Respondent and the Operating Engineers were resolved. Martin's notes suggest that Rolleri answered Mill's suggestion with the assertion that it was the Carpentersí decision.

After additional colloquy, Mills told Rolleri that the Carpenters and the Respondent would keep the old agreement in place until a new agreement was consummated and Rolleri agreed. Teel asserted that he wanted "it to be known that the crafts are still together." Mills agreed and said the Carpenters would leave. Teel asked for a caucus before their departure and the parties broke for a caucus which by the notes extended from 2:10 to 2:24 p.m.

Martin's notes indicate that the parties returned from the caucus and with the Carpenters still present dealt with bargaining proposals until another caucus was held which extended from 2:51 to 4:06 p.m. Negotiations again resumed with Teel distributing a final offer. Rolleri on receiving the proposal asserted: "Obviously we'll need some time to go through this and we would like to set up another meeting." Teel asked: "how long are we going to drag this out," and Rolleri responded: "We're trying to get an agreement." Teel then complained of the Respondent's proposed reductions in benefits and Haworth asserted the Respondent was not so proposing. The Martin notes' final entry asserts: "Carpenters out at 4:12 p.m."

The Operating Engineers' representative Montaño's notes of the session confirm that after the luncheon break the Carpenter's representative Mills wanted "to move out" because the sessions were wasting their time. At the end of the session, Montaño's notes reflect that Rolleri stated that the Respondents had a bargaining session with the Laborers at 4 p.m. and asserted: "We need to set another meeting date." The notes suggest that Teel complained: "How long are we going to drag this out?" and argued that the Respondent was proposing to cut benefits, which assertion was denied. The notes then contain a final entry: "Next meeting set July 19 [for] 10:00 a.m."

Rolleri testified respecting his memory of what occurred at the end of the meeting regarding the issue of contract extension.

> It occurred differently than in the previous meetings in that before I had a chance to raise the issue, Rick Mills of the carpenters' union came around the table and said to Ted Haworth and myself that they were going to continue the agreement into effect until we met again. And that everything would stay as is until that time. As soon as that was said by Mills, I swung around and looked across the table where Dennis Teel, representing the Operating Engineers, was sitting, and asked him if he also agreed to keep the agreement in effect through our next negotiation session. And we had agreed upon a date when that session would be, and he looked down at the floor. His face appeared to turn red, and then he nodded his assent, his head went up and down.

Haworth testified:

> Mills, at the end of the meeting, at approximately 4:00 o'clock stood up and said, "I'm not getting anywhere with these negotiations". He felt like the—he said that he felt the Carpenters were close to an agreement with the company and that he wanted to step back for a period of time and let Granite and the Operating Engineers work out their differences and then he would come back to the table at a later date. And he stood up and made a point that he would call us to schedule another meeting but we wouldn't schedule another meeting at that time and made a specific point that the—to Tom Rolleri that the agreement was extended to the next meeting even though the date wasn't set . . . his point was that he would call and schedule another negotiating session but he wanted to take some time off and make the point that even though a date had not been set for another negotiating session that the old agreement was extended to that next meeting. He said that to Tom Rolleri. . . . Okay. Mr. Rolleri looked at Mr. Teel and said, "And our agreement is extended till the next meeting", and Mr. Teel nodded affirmatively . . . and the meeting adjourned because we had the Laborers waiting for us and that was after 4:00 o'clock and the meeting was—the negotiating session with the Laborers was scheduled to start at 4:00 o'clock.

Dennis Teel testified that at the end of the meeting on July 11 the Carpenters presented a last offer. He recalled:

> After that the Carpenters explained to the company that they were going to be bowing out and they–you know, I believe the company was somewhat shocked, too, like we were that they were going to leave the table until we got our business done. They folded their books up and packed their bags and as they were filing out I believe it was Mr. Mills that asked Mr. Rolleri if he wanted to extend their agreement and Mr. Rolleri said yes. There was not a meeting set that I can remember, and then Carpenters left the hall.

Teel specifically denied that there was any discussion after those events or at any other time in the session about extending the agreements between the Operating Engineers and the Respondent to the next scheduled meeting on July 19. Messengers Ferguson and Montaño corroborated Teel's denials.

Mills testified that at the end of the meeting he told the Respondent that he had to leave and that the negotiations between the Respondent and the Operating Engineers were not benefiting the Carpenters and that they did not intend to continue participating in the negotiations in their current state. As he was leaving, he told the negotiators:

> [T]he Carpenters would work under the agreement that expired, the previous agreement of May 31, '94 until both the Operators and the company got something closer to where we could get back together all of us and finish up in our agreement.

At that point Mills gathered his papers and left with his negotiating team. He specifically testified that he did not hear any exchange between Rolleri or Haworth and Teel regarding an extension of the Operating Engineers agreements.

A second bargaining session was held on July 11 attended by agents of the Respondent and the Laborers. Rene Torres testified that it remained understood between the parties that the contract would remain in effect as long as a new bargaining session was scheduled. At the July 11 session a new session was scheduled for July 26.

3. The strike and related events

a. Prestrike events

Dennis Teel testified that on the afternoon of July 13 after discussing the matter with Ferguson and Montanõ he decided to take the Operating Engineers out on strike. Following the strike decision he testified he placed a courtesy telephone call to Teamsters Representative Mosher who brought Laborers' representative Emilio Torres into the call. Informed of the

Operating Engineers decision, he Teamsters determined to join the strike, the Laborers did not. Teel contacted his counsel and obtained the language of a letter to send to the Respondent. The letter was prepared and sent by facsimile telephonic transmission and mail to the Respondent at its Tucson office just before the close of business on July 13. It asserted:

> This is to inform you that, because we are not making any progress on finalizing our collective bargaining agreement, [the Charging Party Operating Engineers] is terminating the oral agreement to extend the contract effective July 14, 1994. At that time, we will pursue all legal options to secure a collective bargaining agreement for our members. We stand ready to meet with you at any time to conclude the negotiations.

A similar letter was sent by the Charging Party Teamsters in a similar manner. When the Respondent's office personnel received the two letters, Haworth, who was en route to San Diego at the time, was contacted and notified of the letters' content. Haworth the made preparations to return to Tucson and initiated various actions in anticipation of an immediate strike.

b. The strikes

(1) Thursday, July 14, and Friday, July 15

The morning of Thursday, July 14, the Charging Party Operating Engineers and the Charging Party Teamsters commenced a strike against the Respondent picketing its operations with picket signs that asserted, inter alia, "On strike against Granite Construction–no contract." Virtually all Operating Engineer and Teamsters-represented unit employees joined the strike or honored the picket lines. A substantial number of Laborers'-represented employees also honored the strikes.

On July 15 the Operating Engineers filed the charge in Case 28–CA–12629 against the Respondent alleging in part in the body of the charge form:

> Also, on or about July 14, 1994, the employer threatened employees with termination, and did in fact terminate certain employees because they engaged in or supported a strike commenced by [the Operating Engineers] on or about July 14, 1994.
>
> The [C]harging [P]arty seeks, as part of the remedy in this case, that the Board make a determination that the strike is an unfair labor practice strike.

On the same day, the Laborers filed the charge in Case 28–CA–12633 against the Respondent alleging in the body of the charge:

> Since on or about July 14, and continuing to date, [the Respondent] has threatened employees with termination and, on or about July 14, 1994, it terminated employees Francisco Zengia, Kenneth Przyblski, and others, because said employees supported a strike initiated by the Operating Engineers.

The charges on their reverse side each bear the inked impression of a Regional date stamp entry: "Received 9:30 p.m. 15 July 1994"[8]

[8] I administratively notice that Region 28's Phoenix office hours do not encompass 9:30 in the evening and conclude that the a.m.–p.m. setting on the date stamp was incorrect.

On July 15, by facsimile transmission and regular mail counsel for the Laborers sent the Respondent a letter asserting that the Laborers' "are not engaging in economic picketing at this time." The letter continued:

> [The Laborers] believe that Granite Construction Company has committed and is continuing to commit unfair labor practices in violations of the National Labor Relations Act. In that regard, the [Laborers] are filing such a charge with the Board on this date.

Haworth testified to a midday telephone conversation with Torres in which he was assured that the Laborers were not on strike. Torres denied that the conversation occurred.

Guillermo Lopez, a Laborers-represented employee at the time, testified he attempted to enter the Respondent's main facility on the 15th and found the gate locked. He spoke to the guard about obtaining his pay check and was told checks would be distributed later that day at about 3:30 p.m. outside the gate. He testified that when he returned and picked up his check at a desk set up outside the facility along with other employees, he learned from those employees that the Teamsters' and Operating Engineers'-represented employees as well as many of the Laborers'-represented employees had been terminated by Respondent.

Various witnesses called by the Respondent testified that the gates of the main Tucson facility of Respondent, while guarded by security staff in the early days of the strike, were not locked nor were any employees who wished to enter to work for the Respondent denied access. Rather, the Respondent solicited its Laborers'-represented employees to come to work and initially expected them to do so.

On July 14 and 15, Haworth, in consultation with Rolleri and counsel, determined to fire all striking Operating Engineers' and Teamsters'-represented unit employees.[9] At the end of the working day on Friday the 15th of July, 73 employees[10] repre-

[9] Haworth placed the date of the decision as Friday, July 15. Rolleri placed it on July 14 or 15.

[10] The Operator Engineers'-represented employees discharged on July 15 were stipulated to be:

Arriaga, Juan	Avila, Jose
Bingham, Frederick	Bowman, Bernard
Butler, Glen	Canady, William
Casillas, Esgardo	Click, Scott
Cooper, Jon	Corrales, Richard
Crosby, Mathew	Cvitkovich, Dick
DeLaOssa, Abel	Donald, Terry
Drake, John	Dunham, Walter H.
Dunham, Walter R.	English, Timothy
Figueroa, Richard	Galloway Eddie
George, David	Green, Lewis
Gustafson, Tom	Hancock, Kent
Hernandes, Julius	Hindman, Raymond
Horne, Rock	Hosterman, Stanley
Hulsey, Donald	Hunziker, Eugene
Iverson, Lester	Jacobs, Clinton
Jordan, Charlie F. Jr.	Jordan, Charlie F. Sr.
Marsteen, Stephen	Martinez, Florentino
McCormick, Kenneth	McCune, Larry
McDaniel, Bobby Joe	McDaniel, William
McNeeley, Brian	Mercer, John
Mercer, Timothy	Moody, Jeff
Mozingo, Dannie	Musselman, Richard
Olivares, Jose	Price, David
Radloff, Kenneth	Ramirez, Mike

sented by the Operating Engineers and 41 employees[11] represented by the Teamsters were discharged by letters dated July 15 which asserted that each employee was being discharged for engaging in improper strike activity prohibited by the contract. At the same time 14 of the Laborers' represented unit were discharged.[12]

Haworth testified respecting the Laborers' represented employees:

> Q. BY MR. HARRIS: Okay. And some of the Laborer employees, Laborer represented employees, came to work on the fourteenth of July, isn't that correct?
>
> A. Yes. Some of them continued to come to work for quite some time.
>
> Q. Right. Some came to work and left the same day, is that true?
>
> A. Yeah, we had every derivation.
>
> Q. And some didn't come to work at all?
>
> A. That's correct.
>
> Q So those who left and those who didn't come to work, they were discharged on July 15?
>
> A. Well, that was nebulant, it was hard to tell with regard to the Laborers who was on strike. Their counsel said they weren't on strike. So I don't believe very many, if any of them, were terminated on July 15. There may have been a few.

(2) On and after July 16

While there is little doubt the parties were active in various ways over the weekend of July 16 and 17, no discharges occurred and the record is not clear respecting whether the Respondent engaged in commercial activity or the Operating Engineers and Teamsters engaged in significant picketing. Jones credibly testified however that over the weekend of July 16 and 17, the placard wording on the Operators' and Teamsters' picket signs was changed to "unfair labor practice."

On the morning of Monday, July 18, 1994, the Laborers commenced a strike against the Respondent picketing its operations with picket signs that proclaimed an unfair labor practice strike against the Respondent. As Laborers were identified by Respondent as participating in the strike or refusing to go to work because of the picket line, they were terminated for participating in an illegal strike.[13] Over the period July 18 through 25 an additional 10 for a total of 24 Laborers'-represented employees[14] were discharged. Their termination slips bore the uniform explanation: "participation in illegal strike in violation of collective bargaining agreement."

On July 19, 25, and 26, the Respondent and the respective Unions attended their earlier scheduled bargaining sessions. At each session the Respondent distributed a letter to the particular Union indicating that the contracts had been in effect up to the scheduled bargaining session and, that strike activity before that time was in violation of the agreements. The letters added that the Unions' conduct respecting the strike was improper and illegal and caused the Respondent to reevaluate its voluntary recognition of the Unions. The letters announced that the contracts were not to be extended further, were expired, and that the Respondent repudiated both the expired agreements and the existing bargaining relationships. The Respondent thereafter implemented certain changes in each unit's terms and conditions of employment and hired both new and previously discharged employees into unit positions.

The Respondent early on determined that discharged employees were eligible to return to work and solicited them to do so. Over time commencing after the withdrawal of recognition in each unit at the meetings noted above, some discharged employees applied for and were rehired by the Respondent in the

---

Renteria, Alfredo	Roberts, Diane
Romero, Ernesto	Romero, Juan
Sainz, Jerry	Scott, Kyle
Scott, Ron	Sierra, Pablo
Sipe, Dennis	Spelbring, Suzzane
Stockbridge, Jeri	Stubbins, George
Sturgis, Douglas	Sullivan, Carol
Tolley, Thomas	Trivitt, James
Tynes, Gregory	Tynes, Teddy
Van Prooyen, Brent	Wallen, Jeff
Watson, Earl	Weller, Fred

[11] The Teamsters'-represented employees discharged on July 15 were stipulated to be:

Abeyta, Ernesto	Archer, Edward
Arter, Wayne	Ashby, Homer
Ballentine, Robert	Bates, Paul
Carrasco, Mario	Clark, Ricky
Clarke, Connie	Farruggia, Salvatore
Fitzgerald, Maureen	Gauthier, Richard
Gillock, David	Green, George
Gustafson, Susan	Hartig, Torry
Hayes, Mina	Hewes, Daniel
Hjightower, John	Hull, Dwain
Knipp, Kenneth R. Sr.	Montoya, Quirino
Olm, John	Padilla, Henry
Peck, John	Sandifer, Larry
Sipe, James	Turney, Charles
Walker, Carlton	Willis, Roy

[12] The parties stipulated to a total of 24 discharged Laborers'-represented employees. The termination slips put into evidence indicate that 12 individuals were issued slips dated July 15, 10 were issued slips bearing dates in the period July 18 to 25. Two individuals, messrs. Ruben Gallardo and Florencio Trahin, did not have termination slips in evidence nor were their dates of termination otherwise established. The complaint alleges, the answer admits and the parties further stipulated that all the Laborers' represented employees were discharged on or about July 15. Gallardo testified, but did not address this issue. Given the burden of proof on the General Counsel as to the allegations of the complaint, I find it is appropriate to conclude that these two individuals were terminated on July 15. Given that conclusion the 14 Laborers' represented employees discharged on July 15 are:

Chanez, Jose	Duarte, Jesus
Gallardo, Ruben	Gonzales, Joel
Lopez, Guillermo	Lugo, Rodolfo
Meza, aureano	Przybylski, Kenneth
Ruiz, Roberto	Sanchez, Victor
Sturgis, Chad	Trahin, Ruben
Valdez, Carlos	Zengia, Francisco

[13] Some Laborers'-represented employees never returned after July 13 and the Respondent concluded on and after July 18 that they were honoring the strike and fired them in consequence. Other employees worked for a period and thereafter went on strike. Thus, for example, James Pete worked on July 18, but refused to do so on July 22 when he returned for his check and was fired in consequence.

[14] The remaining 10 Laborers'-represented employees discharged during the period July 18 through 25 are:

Arvayo, Ignacio	Bailon, Mercedes
Crater, Daniel	Enriquez, Jesus
Escalante, Jorge	Miranda, Richard
Pedrosa, Richard	Pete, James
Ripalda, Octavio	Spean, Rexson

bargaining units. The Respondent has not again granted recognition nor resumed bargaining with any of the Charging Parties. The three strikes apparently continue.

4. Conduct alleged to violate Section 8(a)(1) of the Act

The General Counsel alleged a variety of statements by agents of the Respondent to employees during the strike as independent violations of Section 8(a)(1) of the Act and, in some cases, also alleges the conduct to be violative of Section 8(a)(5) of the Act. The testimony respecting these events is in some conflict. Importantly, however, the Respondent makes a variety of legal arguments that the allegations, even if supported by the facts, may not in the context of the strikes herein be found to violate the Act. The applicability of these defending legal arguments depend in important part on my findings, infra, respecting whether or not and, if so during what periods, the strikes of the Charging Parties were prohibited, economic or unfair labor practices strikes.

Given this rather unusual necessity of making legal determinations respecting certain allegations of Section 8(a)(3) of the Act in conjunction with determining the nature of the strikes over time, it is appropriate to defer both a fuller recitation of the evidence offered respecting the allegations and the analysis and conclusions respecting them until the other allegations of the complaint are addressed. Accordingly, a complete treatment of the Section 8(a)(1) issues is presented infra.

B. Analysis and Conclusions

1. The discharge of the Operating Engineer and Teamsters-represented employees

There is no dispute and, indeed, the parties stipulated the specific individuals terminated by the Respondent on July 15 in consequence of the strikes. The Respondent argues that the discharges were proper because the initial strikes of the Charging Party Teamsters and Charging Party Operating Engineers were illegal strikes in breech of the no-strike provisions of the old contracts which had been specifically extended beyond their expiration dates and were in effect at the time of the strike's initiation. The Charging Parties and the General Counsel strongly contest this assertion.

The analysis of the allegations that the discharges violated the Act thus depend at their threshold on a resolution of just what occurred at the bargaining table and the legal consequences thereof. Accordingly, it is appropriate to turn initially to a resolution of the factual conflicts and legal implications of the bargaining table conduct.

a. Resolution of conflicting testimony respecting extension of the old agreements

(1) Overview of issues and arguments

The Respondent argues that in the 1994 bargaining, a general ongoing commitment by the negotiators was made to extend the old contracts on a meeting to meeting basis, which agreement continued through early July negotiations and therefore extended the agreements to negotiation sessions scheduled to occur well after the strikes' inception by the Unions. Further, the Respondent argues that additional, if redundant, specific agreements were entered into between the Respondent and the Charging Party Teamsters on July 6 and the Respondent and the Charging Party Operating Engineers on July 11, to extend the agreements to the next scheduled session.

The General Counsel and the Charging Parties argue that there was neither a general on going agreement to extend any Operating Engineer or Teamsters contract on a meeting to meeting basis, nor was their a specific agreement on July 6 or July 11 to extend any Operating Engineer or Teamsters agreement to the next scheduled bargaining session.

In advancing their arguments, the parties rely on the testimony of their own witnesses and attack the credibility of the testimony of opposing witnesses. These arguments were undertaken at trial and on posthearing brief by marshaling a careful, critical analysis of the various witnesses' testimony and their supporting notes with emphasis on inconsistency, bias and the traditional impeaching techniques of trial practitioners. Further, each side argued a general bad faith and controlling hostility and willingness to testify falsely on the part of the opposing witnesses which would merit disbelief in their testimony.

(2) Gambit declined—no liars found

In resolving the conflicting versions of events during the bargaining sessions described in part infra, it is appropriate to note at the onset some of the broader arguments made by the parties which I have found unpersuasive. In general, these arguments sounded in asserted reasons to discredit the testimony of various witnesses as willfully false.

First, I have considered and reject the arguments of the General Counsel and the Charging Parties that the Respondent, through its agents Haworth and Rolleri, was engaged in a calculated plan or course of conduct to create or provoke a situation in which the Unions would engage in a strike and Respondent could discharge its represented employees and repudiate its bargaining relationships with the Unions. Thus, I decline to find that Respondent entered into the series of events in controversy herein willfully and with knowledge aforethought, in effect relying on trick, deceit, and subterfuge to cause a strike which thereafter could consciously be used as pretext to justify the otherwise illegal course of terminating represented employees and withdrawing recognition and bargaining from the Unions.

I reach this conclusion for several reasons. First, although the Charging Parties assert that Respondent engaged generally in bad faith bargaining, the General Counsel has not alleged such conduct as a violation of the Act and, without such allegations in the General Counsel's complaint, findings of bad-faith bargaining are precluded. Second, and more importantly, based on a close observation of Respondent's agents Rolleri and, particularly, Haworth, during their testimony and in consideration of the entire record herein, I found Rolleri and Haworth to be straight forward witnesses with a convincing demeanor. Thus, I believed them, again principally the repeated demurrers of Haworth, when they testified that it was not their intention, plan or even expectation that a strike occur or that the Unions were being consciously baited or provoked by the Respondent's agents. Further, and on the same basis, I found their testimony respecting what was said and done during bargaining to be a truthful attempt to recount events as they transpired.

I also reject Respondent's attacks on the credibility of the Union's agents on similar grounds. Thus, Respondent would have me view the testimony of the Unions' agents in light of their institutional interests, perceived inadequacies of demeanor, argued inconsistencies and, particularly as to Teel, purported desire in portions of the negotiations to avoid inclusion of certain matters in any final written collective-bargaining agreement and conclude the Union witnesses were trying to

conceal their agreements to extend the contracts so that they might avoid the legal consequences of their strikes.

The Respondent argues ably and at length that the testimony and behavior of the Union's agents, the wording of their July 13 communications to the Respondent, quoted in part supra, their conduct at the first strike meetings—all indicate that at the time they called their strike they well knew that the contracts had been extended by specific agreement of the Respondent, the Teamsters and the Operating Engineers, and that their position and testimony during the trial that such agreement was never entered into is simply an after the fact fabrication designed to conceal the truth and produce an unjust application of the Act. Thus, the Respondent argues that these men lied in their testimony and that their version of events should be rejected.

Respondent's arguments like the General Counsel and the Charging Parties', supra, fail not for want of skill in argument but rather because, rather singularly for a situation presenting fundamental testimonial conflicts, I formed the firm belief in observing the testimony of the bargaining agents and in considering their demeanor in the context of the record as a whole—including the impeaching arguments and imprecations of counsel—that each Union bargaining agent witness was honestly endeavoring to describe the events as he recalled them. Thus, I do not believe, and on this record explicitly reject the proposition, that the Union bargainers well knew they had agreed to extend the contract before the strike, knew they were bound to the no-strike terms of the contract at the time they initiated the strike and came to their present position only after the events, consummating their concealment and falsification by perjuring themselves at the trial.

In sum, to a degree sufficiently unusual in my experience as a fact finder to be worthy of comment, I conclude the witnesses to bargaining events—the General Counsel's, the Respondent's and the Charging Party's all—were honestly testifying to what they recalled.

3. Findings respecting extension discussions during bargaining

A simple finding that the witnesses were truthful does not resolve the credibility issues herein. Simple honesty is not inconsistent with mistake, misperception or forgetfulness. While some of the testimonial variance at issue herein is susceptible to easy harmonization with differences explained by consideration of the different perspectives of the witnesses, important portions of the testimony are at fundamental variance. Without resolving every difference in testimony, the critical credibility resolutions respecting the extensions agreements during bargaining appear as follows.

I credit the testimony of the Respondent's agents Rolleri and Haworth that the extension agreements discussed in bargaining were consistently phrased as "meeting to meeting" rather than "day to day" or "until agreement is reached" extensions. The specific language appearing in the bargainers' notes is consistent with this assertion. The Respondent persuasively argues that the other versions of extension agreement wording described by witnesses were implausible because extensions in those terms would not be likely bases for agreement. Thus a "day to day" extension would not have been of value to the employer who was seeking extensions as assurance that a surprise strike would not disrupt his operations. The Laborers' recollection that they and the Respondent regularly agreed upon an extension of the old contract "until agreement is reached" is similarly unlikely. In all events, such an agreement was far beyond what was admittedly discussed in sessions dealing with the Teamsters and Operating Engineers' contracts.

I realize in making this finding that I am discrediting the contrary assertions of Jones, a witness acknowledged by the Respondent's agent Haworth to be an honest man and one who testified credibly that he had no authority to enter into such an extension arrangement, and of Wilson, Jones' colleague in negotiations. I do so, in part, because of the persuasiveness of the Respondent's argument noted above that a day-to-day extension agreement would not have served the interests of and hence not have been proposed or accepted by the Respondent. Further, Wilson recalled that the extensions were agreed to by the Unions through either Teel or Jones depending on the particular meeting. Thus, Wilson drew no distinction between the extension agreements entered into by the Teamsters and the Operating Engineers, and the notes and others testimony of the Operating Engineers' extension agreements make it clear that they were not "day to day" but rather "meeting to meeting." The notes of the June 9 bargaining session make it clear that such extension language was used on that day when Teamsters representatives were present. I conclude that Messengers. Jones and Wilson were simply mistaken and that the words used by the Respondent and the Operating Engineers and the Teamsters describing their extension agreements were "meeting to meeting" and not "day to day."

I also credit Rolleri and Haworth over Jones and Wilson respecting the specifics of the agreement discussed on July 6. Thus, I find that Jones at the July 6 session agreed to a meeting to meeting extension of the old contracts until the next bargaining session which session was scheduled for July 25. Mr. Jones denied any such extension discussion occurred. Wilson testified that only a "day to day" extension was discussed and agreed to at the July 6 meeting. I have found above that the extensions discussed were rather "meeting to meeting" agreements. Thus at least three of the four individuals who testified about the events that day recalled that an extension of some type was discussed and agreed to.

In light of the specific memories of Rolleri and Haworth on the July 6 events and the strong probability that the unusually long period of time until the next scheduled session would have prompted an inquiry by them respecting the contracts' extension as well as Wilson's memory that an extension agreement was discussed and agreed to, I find Rolleri and Haworth's recollections the more credible supported to the extent described above by Wilson. I do not find that either Jones or Wilson was other than fully forthcoming in his testimony. Each held the view—albeit mistaken—throughout the entire prestrike bargaining that the extensions agreed to were day to day and thus susceptible to cancellation on brief notice to the other party. Such an extension agreement would not have been a significant fetter to the Unions' tactical choices respecting a strike and would therefore not have been of great consequence to the Teamsters.[15] Jones in my view has simply forgotten the agreement which occurred on the 6th and Wilson simply con-

[15] These findings are consistent with the role of the Teamsters' agents as they participated in the strike decision process and in the preparation of the Teamsters' July 13 communication to the Respondent. On this record I find that no Teamsters representative believed that the Teamsters had committed to an extension of the contract that could not be validly and timely terminated by the notice ultimately given.

tinued to misrecall the nature of the contract extension agreed to.

Respecting the testimony concerning negotiations between the Operating Engineers and the Respondent, there is some degree of variation in recollections concerning the frequency of agreements proposed and agreed on as the bargaining proceeded. The differences are not significant nor will they be resolved herein. It is clear that an agreement to extend was entered into at the July 5 meeting. The critical factual dispute centers on the July 11 session.

The testimony respecting the July 11 session is largely consistent[16] until the events occurring as the Carpenters departed. Unlike the pattern of earlier sessions, the date of the next bargaining session between the Operating Engineers and the Respondent had not been determined earlier in the session. Further, when the Carpenters were preparing to exit the bargaining session a certain degree of confusion inevitably occurred as the men gathered their things and the other parties—cognizant of the upcoming Laborers bargaining session realized the meeting was at an end. There is no doubt and I find that in these concluding moments in the session, with Mills on his feet in preparation to depart, Mills told the Respondent's agents that even though no new session has been agreed on for the Carpenters, the old contract would remain in place and Rolleri agreed.

Messengers. Rolleri and Haworth, at set forth in greater detail above, testified that immediately after still sitting across the table and asked him if he also agreed to extend the Operating Engineers' agreement to the next bargaining session. Rolleri testified that Teel's answer was nonverbal: "[H]e looked down at the floor. His face appeared to turn red, and then he nodded his assent, his head went up and down." Haworth also testified Teel "nodded affirmatively" in response to Rolleri's question respecting extension. Thus, the Respondent relies on Haworth and Rolleri's descriptions of Teel's physical movements rather than spoken words as binding expressions of adoption and agreement.

Teel recalled the parting assertions of Mills but, corroborated by Ferguson and Montaño, denied that he had been asked by Rolleri to agree, let alone agreed, to an extension of the contract at that point in the meeting or at any other time that day. Mills and Martin described the final events of the session similarly to the others up to the point where the Carpenters agreed with the Respondent to continue the contract, but specifically denied hearing any subsequent discussion by Rolleri and Teel dealing with an extension of the Operating Engineers' agreement. Their testimony was not so much that such an exchange did not or could not have occurred, but rather as a result of their own activities in departing and the numerous people at the table, they simply did not hear or otherwise notice what these individuals said or may have said to one another.

While the parties argued a broad range of points, in effect marshaling the entire record to buttress their respective views on how this factual conflict should be resolved, the dispute is a narrow one. As noted, supra, I have carefully considered the arguments of the parties suggesting that one side or the other to a greater or lessor degree conspired to falsify their testimony respecting these and other events. I have rejected those arguments in general and I do so here as to the specifics in dispute. I accept the arguments of the parties however that this critical exchange: (1) would not have been easily recalled by an honest witness, if it had not occurred and (2) would not have been easily forgotten by a knowing participant or observer given the events that followed in the coming days, had it in fact occurred. My acceptance of these logical arguments produces the seemingly absurd situation: I have found that an important matter that would not likely have been misrecalled is described in essentially diametrical opposition by witnesses whose testimony has explicitly been found to be honest.

The resolution I make based on this record and the credibility resolutions noted is that all the witnesses to the critical events were honest in testifying to what they believed occurred. Thus, I credit Rolleri and Haworth's testimony respecting the question posed Teel and their observation of Teel's apparent response thereafter to the extent consistent with my further findings below. I also credit the testimony of Teel, Ferguson and Montaño that they did not see or hear Teel being asked to extend the contract and that he did not in fact agree to a contract extension at the meeting of July 11. I find that in the confusion that was apparent at that point in the July 11 meeting as the parties were moving around the table and the Carpenters were preparing to make their exit, the extension question was posed to Teel—as testified to by Respondent's agents, but that the question was not heard or comprehended as such by Teel or his colleagues—as the Charging Party Operating Engineers' agents testified—and Teel's downward look and nod of his head occurring thereafter as again described by Rolleri and Haworth were not in response to the unheard extension question, but rather some other circumstance not recalled by any witness nor otherwise identified on this record.

This credibility resolution smacks suspiciously of Solomon's compromise remedy rather than a finding of fact based on a resolution of conflicting evidence. I do not however, simply split the difference respecting this conflict out of inability to resolve the differing versions of events. Nor do I find this resolution describes conduct inconsistent with subsequent events. Rather, the occurrence of a critical mistake respecting what took place at the meeting of July 11 helps to explain the subsequent views of each party in the negotiations, apparent on this record, that the opposing side had a malign plan to take improper advantage and thereafter testified falsely to conceal unpleasant and revealing conduct. Thus, for example, the Respondent sought to demonstrate that in the Union's strike decision process the fact that an extension agreement had been entered into by the Operating Engineers was known to the decision makers.[17] I credit the denials of the participants that this was so. The General Counsel and the Charging Parties sought to establish that the Respondent's agents, especially Haworth, created the fiction of a July 11 extension agreement as a pretext to discharge employees for other improper reasons. I have found, supra, that this was not so. The fact that each side viewed the events of the July 11 as described and took the actions that each did thereafter lends support to my credibility resolution herein.

[16] Although Martin's notes indicate that the Carpenters' protests about progress in negotiations and announcement of an intention to discontinue negotiations occurred far earlier in the negotiations that others recalled, it seems there was a repetition of the remarks at the end of the meeting which were not recorded by Martin inasmuch as he was preparing to leave.

[17] Similarly, as found supra, I have found that the Teamsters representatives involved in the decision to go out on strike did not believe that a meeting-to-meeting extension agreement was in effect respecting their contracts and would not have had such a belief during the strike decision events.

Nor do I view this resolution as inconsistent with probabilities generally. It is not uncommon for witnesses to differ on whether an oral agreement was reached. Such disagreements which, as here, may include strong testimonial assertions and denials that an oral offer was made and an oral acceptance expressed. It would normally be palpably absurd to conclude in such a context that an offer was made, but not heard, or an apparent acceptance of the offer was spoken, but was not in fact a response to or acceptance of the offer. Conduct in the give and take of negotiations is rarely so ambiguous that a mistake of this type is reasonably comprehended. Yet in the instant case the context of events includes the confusion at the meeting's end as described above and, critically, deals with the most ambiguous of exchanges: a spoken offer made as a meeting ended and a nonverbal acceptance apparently manifested exclusively in a downward look and a nod of the head. Such a setting virtually invites mistake and misunderstanding. I find that such a misunderstanding in fact occurred.

b. Legal implications of bargaining conduct

The Respondent argues that during 1994 bargaining both general and later specific agreements had been reached with the Unions to keep all the old agreements in place until the next bargaining sessions and that the Teamsters and the Operating Engineers struck on July 15 before their next scheduled bargaining sessions in breech of their agreements. Since the extended agreements contained no-strike language, argues the Respondent, the employees who struck were in clear violation of the agreements and could therefore properly be discharged for their conduct citing *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956), and *Fort Smith Chair Co*., 143 NLRB 514 (1963) affd. sub nom. *Furniture Workers v. NLRB*, 336 F.2d 738 (D.C. Cir. 1964), cert. denied 379 U.S. 838 (1964).

The General Counsel and the Charging Parties make a series of arguments challenging the Respondent's assertion. They contend that no agreement was reached to extend the contracts, if their argued view of the facts be credited or, in all events, that no agreements were reached as a result of mutual mistake of the parties. They argue further that, if an agreement was reached, it was ineffective as a matter of law to waive employees' protections against discharge under the Act and was, in all events, timely ended through the Unions' July 13 communications to the Respondent. These arguments are worthy of individual consideration and will be discussed below in the context of the specific agreements reached.

(1) Was an earlier general ongoing agreement to extend the contracts in effect at the time of the strike?

Rolleri and Haworth contended that a general agreement was entered into between the Unions and the Respondent as the contracts' May 31 expiration approached to extend the contracts automatically from meeting to meeting. The Union's bargaining representatives, as noted above, disputed this testimony. I did not resolve this apparent testimonial conflict above and do not do so here. That is so because there is no doubt that the later bargaining sessions dealt regularly, if not without exception, with the issue of extension of the agreement from a given bargaining session to the next. Any general agreement that may have been in place in late May or early June was ended by or dissolved into the practice of meeting by meeting arrangements which evolved as the bargaining progressed. There can be no doubt, and I find, that by the critical meetings on July 6 and 11, no ongoing automatic extension process was operative on this record to extend the contracts without specific meeting by meeting agreements to do so. Thus, on this record I find that the Unions could only be held to have extended the agreements as a result of a specific agreement to extend the contracts made at those critical final pre-strike meetings.

(2) Were agreements reached to extend the contracts on July 6 and/or July 11?

As set forth in detail above, I have found that the Respondent proposed an extension of the old agreement[18] to the Teamsters at the July 6 meeting and further found that Jones, an admitted agent of the Charging Party Teamsters,[19] agreed unequivocally—even if mistakenly—to extend the old agreement until the next bargaining session then set for July 25. I have also found that the Charging Party Operating Engineers did not agree at the July 11 session to extend the agreement beyond that session to the next scheduled session, even if Respondent's agents believed that such agreement has been reached.

(3) Was any extension agreement reached insufficient to restrict the right of employees to strike?

The General Counsel citing current authority notes that a Union's relinquishment of a statutory right, such as the right to strike, must be clear and unequivocal. The counsel for the General Counsel argues on brief at 45–46:

> There were simply no discussions between Respondent and the Unions about what effect the contract extension would have on the no-strike clause that was a part of the expired contract. Since there were no discussions between the parties regarding the no-strike clause and the effect of any extension would have on such a statutory right, no mutual assent ever manifested itself between the parties which would be necessary to form the basis for an agreement. The record is clear that the Unions did not relinquish their right to strike in a clear and unmistakable manner.

The General Counsel cites the Board's decision in *Kroger Co.,* 177 NLRB 769 (1969), for the proposition that consideration of a quid pro quo of retroactivitiy must be agreed on by an employer with a union in order to find a waiver of the right to strike in a contract extension context.

I agree with the General Counsel that a contractual waiver of the right to strike is not lightly to be inferred. I find further however that the General Counsel has misread the holding of *Kroger Co.* and incorrectly drawn from it an improper generalized statement of law where its holding was limited to the facts on which it relied. Thus, *Kroger Co.* did not hold that the no-

[18] Each of the Charging Party Union's had two agreements with the Respondent in the period preceding the 1994 negotiations. There seems to have been no specific discussion nor notice given to that fact when the parties were discussing contract extensions. While some argument was made that only an extension of the construction agreements was ever discussed, I find that all parties will be held to the fair meaning of their agreements in light of their conduct. The Respondent carried forward the terms of all contracts and the Union's knew this during the prestrike negotiations. Wherever agreement herein is found to have been reached between a Union and the Respondent to extend the contract, I find the agreement applied to both the construction and rock, sand and gravel contracts without distinction.

[19] While it is clear that Jones did not have actual as opposed to apparent authority to enter into this agreement with the Respondent on behalf of the Teamsters, his apparent authority to bargain is sufficient in such a context to bind his principal. *Anaconda Co.* 224 NLRB 1041, 1052 (1976), enfd. mem. 578 F.2d 1385 (9th Cir. 1978).

strike provisions of an extended contract were ineffective to restrict Union or employee conduct without a specific employer quid pro quo agreement to retroactive application of an eventual new agreement. The Board in *Kroger Co.* simply analyzed the collective-bargaining agreement agreed on by the employer and the union to determine its meaning and applicability. Indeed, the majority specifically rejected the dissenter's view that the right to strike should not be held waived by a labor union's agreement to extend the terms of a facially expired contract which includes a no-strike clause.[20]

Turning to the agreement between the Teamsters and the Respondent on July 6, the descriptive terms used, as found supra, created an agreement to extend the terms of the old agreement to the next bargaining meeting. No discussion, under any view of the events, occurred respecting what elements of the old agreement would be carried forward. Given this fact I find that the entire agreement was extended including those elements favorable to the Union and the employees and those favorable to the Respondent with each being the quid pro quo for the other.[21] Thus I find the contractual restrictions on Union and employee strike activity also extended with the other terms of the agreements as found, supra.

(4) Was any extension agreement reached invalid as a result of mistake?

The General Counsel and the Charging Parties argue at length with copious case citation for the proposition that any apparent agreement reached should be declared void or ineffective because of mistake or failure of mutual assent. Thus, the General Counsel argues that the Unions did not understand that an agreement to extend the contract would relinquish their right to strike for the period of extension and therefore there was no "meeting of the minds" and no "firm agreement" among the parties.

Counsel for the Charging Party Teamsters provides a scholarly survey of the law of "meeting of the minds." He argues correctly that, if the disputed events defining the contested agreement reached between the Respondent and the Teamsters cannot be resolved, no agreement at all may be held to have occurred. I have however discredited Jones' version of events on July 6 as mistaken and credited the version of the Respondent's agents, Haworth and Rolleri. Thus, I found there is no doubt as to what was said in the meeting, only that Jones and Wilson were mistaken in believing that the extension agreements entered into were to extend the contract from day to day rather than from meeting to meeting.

While the June 6 agreement was from Jones' and Wilson's perspective based on their mistaken belief as to what was agreed to, there is neither doubt as to what was in fact said in the meetings nor ambiguity respecting the fair meaning and consequences of the terms actually spoken or the type of extension agreement reached.[22] Thus, the mistake involved here is not the mutual mistake traditionally preventing an agreement from being consummated. Rather the instant case presents the situation wherein one party makes a mistake not attributable to the conduct of the other. Jones, albeit mistakenly, expressly agreed to an unambiguous extension of the contract to July 25, 1994. Such a unilateral mistake does not make a transaction voidable in contract law. See, e.g., Reinstatement, Contracts, §503, (Comment a). Accordingly, I find no defense of mistake is available to the Charging Party Teamsters on this record.

c. Conclusions regarding the validity of the discharges

(1) The employees represented by the Operating Engineers

The parties stipulated to the names of 73 employees represented by the Operating Engineers who were discharged by the Respondent on July 15. The employees were discharged by the Respondent because they engaged in a strike commencing on July 14 in violation of the no-strike provisions of the contract the Respondent believed had been extended to July 19 by specific agreement of the Operating Engineers and the Respondent at their July 11 bargaining session.

I have found above that no such agreement to extend the old contract beyond the July 11 session occurred. While the Respondent had a good faith belief that an agreement to extend the contract had been assented to by Teel, it had not. The agreements between the Respondent and the Operating Engineers therefore expired on July 11 and there was no collective-bargaining agreement in place on July 14 and thereafter and, therefore, there was no contractual restriction of the Operating Engineers or their represented employees' right to strike. Since Respondent fired the employees for striking and because there is no dispute that the employees' concerted withholding of their labor in support of the Operating Engineers' contract demands is protected in the absence of contractual restriction, the Respondent in so doing violated Section 8(a)(3) and (1) of the Act as alleged in the complaint. I so find.

The Respondent had a good faith, but mistaken belief that the employees strike was unprotected by virtue of the extension of the old contracts and the no-strike provisions in those contracts. The Supreme Court has specifically held that a good faith, but mistaken, belief by an employer that employees are engaging in misconduct during the course of otherwise pro-

[20] In earlier times it was generally the case that a new contract contained terms more favorable to the employees and the Union and retroactivity was generally a valuable concession from their point of view. For better or ill this is no longer consistently the case and retroactivity is no longer consistently a matter of value or importance to the Union. More importantly, the extension of the expiring or expired agreement provides continuity of operations for the employer, continued employment for the employees represented by the union and infuses the on going bargaining with a spirit of co-operation which is often of benefit to both sides. This continuity of operations and employment is in my mind easily sufficient consideration for both the union and the employer to bind themselves to keep the contract in place for some agreed-on period.

[21] The Charging Party Operating Engineers on brief at 48 asserts:

> It is black letter law that, where a contract does not have a specific expiration date, a union is free to take strike action after timely Section 8(d) notice has been given. *NLRB v. Lion Oil Co*., 352 U.S. 282 (1957), *Difco Laboratories,* 216 NLRB 76 (1975).

Counsel for the Charging Party Teamsters makes a similar argument at p. 43 of his brief citing *McLean County Roofing*, 290 NLRB 685 (1988). The arguments of counsel do not address the situation here where the contended agreement was to a date certain—the date of the next scheduled bargaining session of the particular contracting parties involved.

[22] Jones testified that he well understood what an extension of an old contract from bargaining session to bargaining session meant. Further, I find that the various types of contract extensions referred to in the testimony of the bargaining professionals in this case were uniformly understood by all parties to have differing and specific contract extension consequences.

tected concerted activities does not constitute a defense to the discharge of such employees. *Burnup & Sims, Inc*., 379 U.S. 21 (1964). The Respondent's mistake therefore does not constitute a defense to the violations found.

(2) The employees represented by the Teamsters

The parties stipulated to the names of 40 employees represented by the Teamsters who were discharged by the Respondent on July 15. The employees were discharged by the Respondent because they engaged in a strike in violation of the no-strike provisions of the contract The Respondent and the Teamsters had extended the terms of their existing agreements to July 25 at their July 6 bargaining session. The provisions of those contracts therefore limited employees rights to strike. The employees did in fact strike. Because their strike was prohibited by the terms of the extended agreements, the employees actions in support of the strike were unprotected and the Respondent could discharge them for that reason. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956).[23]

The General Counsel and the Charging Parties contend that the Respondent did not in fact fire the employees for this reason, but rather did so because of a desire to rid itself of union representation of its employees. The Respondent denies this factual contention, but further argues the issue is immaterial because the employees through their misconduct lost the protection of the Act and could be discharged by the Respondent with impunity citing *Fort Smith Chair Co*., 143 NLRB 514 (1963), affd. sub nom. *United Furniture Workers v. NLRB*, 336 F.2d 738 (D.C. Cir. 1964), cert. denied 379 U.S. 838 (1964).

The Respondent confuses those situations in which employees are held to have violated the strictures of Section 8(d) of the Act which by its terms[24] defines such persons as losing employee status, a situation presented in *Fort Smith Chair*, and those situations where the employees' strike conduct is unprotected but, because the conduct is not in contravention of Section 8(d) of the Act, does not by operation of law eliminate their employee status. The distinction is explained by Board Member Jenkins in his dissent in *Arundel Corp*., 210 NLRB 525 (1974) at 527. The Respondent could not as a matter of law terminate these strikers for impermissible reasons and the argument of the General Counsel and the Charging Parties that the asserted reasons for discharge were mere pretext must therefore be addressed.

I reject the General Counsel and the Charging Parties' pretext argument based on my determination described at length earlier that the Respondent's agent Haworth was an honest witness and that the Respondent was not during these events embarked on a plan or conspiracy to defeat the Unions through pretext and subterfuge. I specifically extend that analysis and conclusion to the General Counsel's claims respecting the reason for the discharge of the striking employees. Thus, I find that the Teamsters'-represented employees were in fact terminated by the Respondent because they were striking and not for other reasons prohibited under the Act.

I have found, supra, that the Teamsters' agreement to the June 6 contract extension resulted from the unilateral mistake of the Teamsters' agents during bargaining regarding the existence and type of contract extensions being proposed by the Respondent and agreed to by the Teamsters. I have also found the Teamsters' agents who determined to strike on July 13 were unaware of the fact that an agreement to extend the contract had occurred which extended the contracts' terms beyond July 15 and which could not be terminated by their communication to the Respondent of July 13. Such a good-faith mistake, like that of the Respondent as found above respecting the disputed extension agreement with the Operating Engineers, does not enhance the rights of the Teamsters' Union nor its represented employees to strike nor diminish the rights of the Respondent to take the action that it did in response to the strike.

Given all the above, the Respondent had the right to discharge the Teamsters'-represented employees for engaging in a strike on July 14 and 15 in violation of the extended contracts' no-strike provisions. I have found that the Respondent fired the Teamsters'-represented employees on July 15 for that reason. The Respondent's actions therefore did not violate the Act and I shall dismiss the portions of the complaint alleging a violation of the Act with respect thereto.

2. The discharge of Laborers'-represented employees

The Respondent, both in argument at the trial and on brief argues the following logical sequence. First, the Laborers'-represented employees terminated on July 15, before the commencement of the Laborers' July 18 strike, were terminated at a time when the Laborers' were prohibited from conducting an economic strike and no unfair labor practices had been committed by the Respondent. Second, because no Laborers'-represented employees were improperly discharged by the time of the early morning July 18 commencement of the Laborers' strike, the Laborers' strike could not have been an unfair labor practice strike. Third, the Respondent argues, if the Laborers' strike was not an unfair labor practice strike, it was prohibited by the terms of the extended 1991 Laborer agreements and was an illegal strike. Fourth, and finally, the Respondent argues that since the Laborers' strike was illegal and unprotected, the Laborers'-represented employees who honored the Laborers' improper strike were themselves engaged in unprotected activity for which they could be, and were, properly discharged. Thus, concludes the Respondent's argument, its discharges of Laborers'-represented employees were not in violation of the Act. The General Counsel and the Charging Parties dispute each step in the Respondent's argument.

The findings, supra, that the Operating Engineers' strike was economic until July 15, at which time the termination of the Operating Engineers'-represented employees honoring the strike converted the strike to an unfair labor practice strike, add an element of complexity to the evaluation of the merits of the allegations respecting the discharged Laborers'-represented employees not fully anticipated or argued by the parties in all its possibilities. It seems best given these circumstances to consider the Laborers'-represented employees' situation on a step by step basis.

a. Basic statement of events

There is no dispute that the contracts between the Respondent and the Laborers were extended at least until July 26. There is no dispute that the Laborers did not engage in a strike against the Respondent until Monday, July 18, at which time

[23] A more detailed discussion and analysis of the wording of the contracts and the case law governing contractual restriction of the right of employees and unions to strike is set forth, infra, in the discussion of the contracts' application to the Laborers' represented employees at Legal Rights of Strikers under Relevant Agreements, p. 30.

[24] Sec. 8(d) of the Act asserts in part: "Any employee who engages in a strike [in violations of this Sec.] shall lose his status as an employee . . . ."

the Laborers picketed the Respondent with placards proclaiming an unfair labor practice strike. While there was some arguably conflicting testimony respecting whether or not the Laborers'-represented employees could have physically have entered the Respondent's worksites on July 14 and 15 and thereafter, i.e., whether the employees were locked-out rather than on strike, I find that the employees were in fact able to go to work[25] and that during the period of the strike—commencing at various days during the period July 14 through the end of the following week—various Laborers' represented employees withheld their labor from the Respondent. Finally, there is no dispute that on various dates from July 15 through July 25 Laborers'-represented employees who were not coming to work were discharged by the Respondent for that reason.

b. Analysis

(1) Legal rights of strikers under relevant agreements

The analysis of the situations respecting the Operating Engineers' and Teamsters'-represented employees will not be repeated here. Employees who engage in economic strikes against their employer are engaged in protected conduct for which they may not be discharged. Employees who have lost their right to engage in an economic strike through the terms of a collective bargaining agreement lose the protection of the Act if they engage in such activities and may be terminated by their employer for such conduct.

At the onset of the analysis of the situation pertaining to the Laborers'-represented employees, it is appropriate to note that employees who withhold their labor in support of others, i.e., sympathy strikers, are engaged in protected concerted conduct. *Teamsters Local 79 v. NLRB (Redwing Carriers),* 325 F.2d 1011 (D.C. Cir. 1963). Employees who support a strike by another unit of employees at their own workplace are akin to economic strikers. *Newberry Energy Corp*., 227 NLRB 436 (1976). Thus, an employer may not terminate such strikers because they engage in such activity.

The right to engage in a sympathy strike may also be waived by contract however. *NLRB v. Rockaway News Supply Co*., 345 U.S. 71 (1953). The Board in *Indianapolis Power Co*., 291 NLRB 1039 (1988), established the current standard for determining if the right to engage in sympathetic strikes has been waived by contract language. Broad no-strike language in a contract is held to include sympathy strikes absent contrary evidence and circumstances not relevant to the instant case.

The applicable 1991 Arizona rock, sand, and gravel agreement between the Laborers and the Respondent specifically includes language waiving covered employees' rights to engage in "sympathy, or any other kind of strike" or the refusal to cross a picket line. The applicable 1991 construction agreement between the Laborers and the Respondent includes language binding the Union and represented employees not to "sanction, aid or abet, encourage or continue any work stoppage, strike, picketing or other disruptive activity." There is no evidence in the record to suggest that the parties did not intend to include sympathy strikes within the prohibition strike activity of the 1991 construction agreement. Sympathy striking or the honoring of strikes and or picket lines of other employees of Respondent was therefore not permissible for Laborers'-represented employees during the currency of the 1991 collective-bargaining agreement.

An exception to the contractual waiver and striker's rights cases noted above deals with the special circumstance of an unfair labor practice strike. General no-strike clauses in collective-bargaining agreements have been held not to waive the right of employees to engage in strikes in protest of serious unfair labor practices. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). There is no question and I find that the relevant Laborers' contracts with the Respondent did not act to restrict represented employees' right to engage in unfair labor practice strikes.

The Board holds that a sympathy striker who acts in support of unfair labor practice strikers assumes their status. *Hoffman Beverage Co.*, 163 NLRB 981 (1967). The Board further holds that a contractual waiver of sympathy striker rights does not limit the right to support strikes protesting serious unfair labor practices. *Pilot Freight Carriers,* 224 NLRB 341 (1976). Thus, if the Laborers'-represented employees sympathetically protested the serious unfair labor practices of the Respondent respecting other units by engaging in an unfair labor practice strike or honoring the unfair labor practice strike of other bargaining units, that action would not be prohibited under the 1991 agreements and, consistent with the analysis, supra, would be concerted protected activity.

Given the differing rights that employees striking or honoring the strikes of others have depending on the nature of the strike involved and other relevant circumstances, it is appropriate to turn to the events of July 14 and following.

(2) The status of the strikes and strikers at relevant times[26]

(a) The Operating Engineers' strike

On July 14 the Operating Engineers struck the Respondent. I have found the Operating Engineers' strike at its inception to be an economic strike. I further found the Respondent's July 15 discharge of all its striking Operating Engineers'-represented employees to be an unfair labor practice. While not relevant to the determination of the propriety of the discharge of the Operating Engineers'-represented employees undertaken above,[27] the status of the Operating Engineers' strike after the terminations became known to the fired employees and the Union on July 15 is relevant to the situation of the Laborers'-represented employees.

The record is clear that on July 15 the Respondent improperly terminated some 70 plus Operating Engineers'-represented employees, i.e., every Operating Engineers-represented employee who struck which also was virtually every individual in

[25] There were some occasions when laborer-represented employees attempted to go to work and were told that no work was available that day due to the strike. There is no suggestion however that any employee in such a circumstance was discharged by the Respondent for failing to work on such a day.

[26] On July 14 the Teamsters struck the Respondent. I found the Teamsters' strike to be in breech of no-strike language in the extended contracts and unprotected. I found therefore that the Respondent's July 15 discharge of Teamsters'-represented employees who engaged in the prohibited strike was not an unfair labor practice. The Teamsters' strike is therefore not in issue respecting or material to the Laborers'-represented employees. See further discussion, infra.

[27] Inasmuch as the remedy provided the discharged economic strikers represented by the Operating Engineers, as set forth in the remedy section of this decision, infra, is not based on or affected by the status of their strike after their discharges, it was unnecessary to establish the strikes' status in resolving the Operating Engineers'-represented employees discharge allegations.

the Operating Engineers' bargaining units. These terminations were a serious unfair labor practice. The Operating Engineers continued the strike after the discharges changing their picket signs to include references to an unfair labor practice strike.

Strikes are converted from economic to unfair labor practice strikes, if it is shown that the unfair labor practices are a factor in causing or prolonging the strike. *Frank Invald v. NLRB*, 48 F.3d 444 (9th Cir. 1995). The unlawful conduct need not necessarily be the sole or predominant cause and both subjective and objective factors may establish such facts. *Gaywood Mfg. Co*., 299 NLRB 697 (1990). Further the Board holds that certain types of unfair labor practices by their very nature will have a reasonable tendency to prolong the strike and therefore provide an independent, per se, basis for finding a conversion from economic to unfair labor practice strike. *F. L. Thorpe & Co*., 315 NLRB 147, 149 (1994); *C-Line Express*, 292 NLRB 638 (1989).

The Board has long held that the termination of strikers is such an independent factor. In *Vulcan-Hart Corp.*, 262 NLRB 167 (1982), the Board addressed an employer's October 30 wrongful discharge of 19 strikers—approximately one half of the unit involved:

> Such conduct, a blow to the very heart of the collective bargaining process, leads inexorably to the prolongation of the dispute. In these circumstances we find that the employees involved in the walkout became unfair labor practice strikers on and after October 30. . . . [262 NLRB at 167.]

The Board has held to that view. *Nobit Bros*., 305 NLRB 329 (1992); *Fun Connection & Juice Time*, 302 NLRB 740, 740 fn. 1 (1991); *GSM, Inc*., 284 NLRB 174 (1987).

Further there is no need for the employees or the Unions to first realize that the discharges were illegal as a precondition that the strike be converted from an economic to an unfair labor practice strike. The Board in *Pittsburgh & New England Trucking*, 238 NLRB 1706 (1978), specifically reversed an administrative law judge who held that, since neither the union nor the employees realized the unlawful nature of the employer's actions, the unfair labor practices involved could not convert the economic strike to an unfair labor practice strike. The Board held that the conduct at issue therein was inherently destructive of employees Section 7 rights and specifically rejected the proposition that "the failure of the employees to perceive fully the unlawfulness of the [unfair labor practice involved] can relieve Respondent of the responsibility for its actions." (238 NLRB at 1707.)

It follows, therefore, and I find the strike of the Operating Engineers was converted from an economic to an unfair labor practice strike on July 15 when the fact of the terminations of the striking employees represented by the Operating Engineers became known. At that time those employees of the Respondent supporting the strike[28] including the sympathy strikers became unfair labor practice strikers.

[28] Support in this sense extends to even uninformed passive honoring of the picket line. Thus, in *White Oak Coal Co*., 295 NLRB 567 (1989), the Board found that an employee who had been hired, but had not yet had occasion to start work and who honored the strike only to "avoid trouble" and did not join in the picketing had made common cause with the strikers and took on their unfair labor practice striker status.

(b) The status of the Laborers'-represented employees who honored the Operating Engineers' strike before the Laborers' strike on July 18

Because of the close proximity of the change in the status of the Operating Engineers' strike and the termination of the first group of the Laborers'-represented employees who honored the strike, it is important to examine carefully the sequence of events respecting these individuals and their status at particular times. The Operating Engineers were terminated on July 15. The fact of their terminations was conveyed to at least a significant number of them when they picked up their paychecks at about 3:30 p.m. outside the Respondent's main facility in Tucson.

It was relatively easy for the Respondent to identify and discharge the Teamsters and Operating Engineers'-represented employees who were honoring their Union's picket line. The situation respecting the Laborers' units was ambiguous however. The Laborers had not declared a strike nor set up a picket line and their represented employees did not respond to the strike in a uniform or consistent manner. Thus, Haworth testified that even into the early afternoon of July 15, he had been informed that the Laborers' Union was not on strike. Further, some Laborers'-represented employees had reported to work and were working, others had reported to jobsites and been sent home for lack of work due to the strike of others. Yet others were clear in their support for the strike and picket lines. Haworth initially testified that few Laborers'-represented employees were terminated on July 15 because it was simply difficult to be sure that given individuals were on strike. None the less, by the close of that business day, Haworth testified the Respondent came to believe that some Laborers' employees had joined the strike and, as noted above, 14 Laborers'-represented employees were terminated for participating in an illegal strike that day.

Before the discharge of the Operating Engineers'-represented employees on July 15, their strike against the Respondent was economic. Since the Laborers'-represented employees who were discharged on July 15 received their terminations simultaneously with the Operating Engineers who were also terminated that day, the wrongful discharge of those Operating Engineer employees did not precede and therefore could not shape or effect the nature of the strike activities of the Laborers'-represented employees who were also fired that day. Thus, the unfair labor practice of discharging the Operating Engineers' represented employees and the fact that the Operating Engineers strike was by the Respondent's announcement of those wrongful terminations converted to an unfair labor practice strike came too late in the day to give the Laborers'-represented employees fired on July 15 sympathy unfair labor practice striker status at the time of their discharge.

As found above, the Laborers' contract was admittedly in effect on July 14 and 15 and contained no-strike language validly prohibiting sympathy strikes. The Laborers'-represented employees who honored the Operating Engineers' strike before it was converted into an unfair labor practice strike were therefore engaged in prohibited sympathetic activities. The Respondent could terminate the employees for that reason under the contract. I find it did so and therefore the Respondent's discharge of the Laborers'-represented employees on July 15 did not violate the Act. I shall therefore dismiss the complaint allegations with respect to these 14 individuals.

(c) The status of the Laborers' July 18 strike

Consistent with the analysis of the Teamsters' and Operating Engineers' July 14 strikes, the Laborers' strike, which admittedly took place during the life of the Laborers' contracts with their effective prohibition of economic and sympathy strikes, was either a protected unfair labor practice strike or a strike in violation of the contracts and hence unprotected. If the Laborers' strike was an unfair labor practice strike, both the occurrence of unfair labor practices and a legally sufficient nexus between the unfair labor practices and the strike must be demonstrated.

As found above, the Teamsters' strike and picket line were unprotected activities and the discharge of the Teamsters'-represented employees by the Respondent was not an unfair labor practice. Further, the discharges of Laborers-represented employees occurring before the initiation of the Laborers' strike, i.e., the discharges of Laborers'-represented employees by the Respondent on July 15, have been found above not to have been in violation of the Act. Therefore the fact that the Laborers may have initiated their strike to some degree in protest of any or all of these actions may not be a basis for finding that the Laborers' strike was an unfair labor practice strike. These events and actions eliminate as potential unfair labor practices all allegations in the complaint[29] except the circumstances respecting the Operating Engineers and their represented employees.

As found, supra, the Respondent's discharge of the Operating Engineers'-represented employees on July 15 constituted serious unfair labor practices and converted the Operating Engineers strike to an unfair labor practice strike at the end of the working day on July 15. The General Counsel and the Charging Parties argue the Laborers' strike, which commenced on the morning of Monday, July 18, was initiated as and remained at all relevant times an unfair labor practice strike. It is therefore appropriate to consider whether or not the Laborers' strike may on this record be held to be an unfair labor practice strike because of the wrongful discharge of the Operating Engineers'-represented employees. To a degree resolution of this issue repeats portions of my earlier analysis.

For a strike to be an unfair labor practice strike, there needs be a relationship between the unfair labor practices of the Respondent and the strike. Those unfair labor practices need not necessarily be the sole or predominant cause of the strike and both subjective and objective factors may establish such facts. *Gaywood Mfg. Co*., 299 NLRB 697 (1990). The Board with court approval holds that in evaluating whether or not a strike occurred because of unfair labor practices the dispositive question is whether or not they it was motivated in part by the employer's improper conduct, not whether or not the strike would have taken place without the occurrence of the unfair labor practices. *Northern Wire Corp. v. NLRB*, 887 F.2d 1313 (7th Cir. 1989).

The Laborers' strike commenced early in the morning on Monday, July 18 and was characterized by the Laborers' picket signs as an unfair labor practice strike and against conduct "in violation of federal law." Rene Torres testified that he and Ermilo Torres and Anthony Martinez determined to commence the strike. Neither Ermilo Torres nor Anthony Martinez testified about their or other Laborers' agents motivation for calling the strike. Rene Torres testified initially that the strike was called because the Respondent had "fired all the employees on the 15th." He later made it clear however that his reference to "all employees" was to those employees represented by Laborers who were fired on July 15 by the Respondent.

Guillermo Lopez, a longtime member of the Laborers' Union and Laborers-represented employee, testified that he had not gone on strike on July 14 or 15. On the first day of the Laborers' strike, July 18, he arrived very early at work, waited outside and, when fellow Laborers arrived to establish a Laborers' Union picket line, he inquired of them what was happening. He was told by the picketers, apparent agents of the Laborers,' "we're going to have to join the other guys with the strike" whereupon he joined the strike and picketing.

Were the record evidence respecting the Laborers' subjective motivations for calling the strike and their characterization of their strike as an "unfair labor practice strike," the sole evidence connecting the unfair labor practices of July 15 and the Laborers' strike of July 18, it would be a close question respecting the sufficiency of the evidence to establish the requisite nexus. What must also be considered in the evaluation, however, is the relationship between the Laborers and Operating Engineers' Unions and their represented employees both in bargaining and in the workplace.

Based both on the record evidence of the heavy highway construction and rock, sand, and gravel aspects of the Respondent's operations and by noticing administratively the relationship between and among the craft unions within the construction industry, I find that the represented employees of the craft unions employed by the Respondent from 1980 until the strikes of July 1994 worked at common job sites and on common work. The record suggests that respecting the Respondent's operations during that period, the crafts took a common approach in labor relations reflected in similar contract language and apparently parallel history of contract intervals and bargaining.

In 1994 until the strikes in controversy, the Unions, including the Laborers and the Operating Engineers, frequently bargained with the Respondent at common sessions with the Operating Engineers' agent Dennis Teel as lead negotiator for all the crafts, bargained at sessions that followed hard on one another's sessions or involved representatives of one or another craft attending the bargaining sessions of the others. Even where there were evident differences in the perceptions of bargaining progress between the Unions, they endeavored to keep a common front. Thus, as the Carpenters prepared to leave the negotiations on July 11, having deferred their bargaining to await further progress with respect to the Operating Engineers bargaining, Teel told the Respondent's agents Haworth and Rolleri: "I want to let it be known that all the crafts are still together" and the Carpenters' representative agreed.

Given this evident collaborative bargaining, the lead role of the Operating Engineers' agent Teel during bargaining and the

[29] Complaint subpars. 17(a) and (b) allege conduct occurring on July 14. Each subparagraph alleges that the Respondent threatened employees with discharge unless they crossed the picket lines of the Teamsters and/ Operating Engineers. Assuming the facts support the allegations, it would not have been a violation of the Act to so threaten Laborers' or Teamsters'-represented employees at that time given the applicability of the contracts to those employees and the absence of any prior unfair labor practices. While such conduct would violate the rights of Operating Engineers'-represented employees who were engaged in an economic strike on July 14, on this record such conduct would not have been sufficient to give the Laborers' strike unfair labor practice strike status.

craft history of close working circumstances and general mutual aid and support,[30] I find there is substantial objective evidence that the Laborers' in calling the strike of July 18 and the Laborers'-represented employees who honored that strike did so in part because Respondent fired all striking Operating Engineers on July 15.[31] As noted in *Vulcan-Hart Corp.*, 262 NLRB 167 (1982), the discharge of strikers is "a blow to the very heart of the collective bargaining process" and "leads inexorably to the prolongation of the dispute." As found supra, these were serious unfair labor practices.

In light of the noted interrelationship of the bargaining of the Operating Engineers and the Laborers, and in consideration of the other evidence noted and the record as a whole, I have no doubt and specifically find that the discharge of the 73 Operating Engineers'-represented employees at the same time the Laborers'-represented employees who had honored their line were discharged, was a factor within the meaning of the Board and court cases cited in the Laborers initiating their strike on July 18 and the Laborers'-represented employees in honoring that strike thereafter.

Based on the above, I further find that the Laborers' strike against the Respondent commencing on July 18, 1994, was an unfair labor practice strike from its inception and those Laborers' represented employees who honored the strike and picket line were unfair labor practice strikers. The contract limits on economic and sympathy strikes or honoring of picket lines contained in the Laborers' extended agreements with the Respondent had no legal application to the Laborers' strike or the Laborers' represented employees' honoring of such an strike in protest of Respondent's serious unfair labor practices.

(d) The terminations of the Laborer represented employees who were discharged on and after July 18, 1994[32]

The Respondent admittedly fired on July 15 all Laborers'-represented employees it had confidence were honoring the strikes then occurring. On and after July 18, an additional 10 Laborers'-represented employees were discharged for participating in an illegal strike. I find that this sequence is convincing evidence to support a finding, which I make here, that the Laborers' represented employees fired on and after July 18 were terminated because of their actions in honoring the strikes and picket lines in place on and after July 16 and were not terminated solely for any actions they took or did not take on July 14 or 15.

I have found, supra, that the Laborers strike from its inception was an unfair labor practice strike and that once the Laborers' unfair labor practice strike and picket line commenced on the morning of July 18, all Laborers'-represented employees who honored the strike were unfair labor practice strikers and protected from discharge for that reason.

Having found that the Respondent fired 10 Laborers'-represented employees on and after July 18 for engaging in an unfair labor practice strike, as more fully explained in my analysis of the discharge of the employees represented by the Operating Engineers on July 15, above, the Respondent's termination of these Laborers'-represented employees was improper and a violation of Section 8(a)(3) and (1) of the Act. I therefore sustain the General Counsel's allegations in this regard.

A second issue arises respecting the Laborers'-represented employees terminated on and after July 18 for striking. Were these employees also honoring the strike of the Operating Engineers during this period? By early the following Monday morning, July 18, two major changes in the strikes against the Respondent had occurred. First, that morning the Laborers initiated what they characterized as an unfair labor practice strike and picketed the Respondent's premises with signs bearing their union name and the legend "unfair labor practice strike." Second, as noted, supra, the Operating Engineers' strike was converted to an unfair labor practice strike and the Operating Engineers had changed their picket placards to assert that the strike was an unfair labor practice strike. This picketing by each union continued during relevant times.

It is clear and I have found that many Laborers'-represented employees honored the Operating Engineers' picket line on July 14 and 15. As noted above, the Respondent contends and I found that this was the case as to the Laborers'-represented employees discharged by the Respondent on July 15. Other Laborers'-represented employees[33] also ceased work on July 13, the day before the strikes began, and did not work thereafter, but were not discharged by the Respondent until the following the week of July 18–25.

Based on the fact that this latter category of Laborers'-represented employees clearly honored the Operating Engineer strike on Thursday and Friday, July 14 and 15, I find it is fair to assume that their withholding of their labor in the following week until their discharge was also motivated in part by the same Operating Engineers' strike and picket line that had motivated them just days before. I find therefore that these employees were striking during the week of July 18 in support of the unfair labor practice strike of the Operating Engineers. These individuals were therefore sympathy unfair labor practice strikers supporting the striking Operating Engineers Their right to engage in support of other employees' unfair labor practice strike was not limited by the Laborers' contracts. Accordingly they were engaged in protected conduct on and after the Operating Engineers strike converted to an unfair labor practice strike on the evening of July 15. This is so irrespective of the status of the Laborers' strike and picket line. Thus, their discharge for striking is also a violation of the Act based on their protected conduct in supporting the Operating Engineers' unfair labor practice strike.

Other Laborers'-represented employees worked up until the commencement of the strikes, did not work on the initial day or two of the strike and worked on Monday, July 18, not working thereafter.[34] All were terminated in the period of July 19–25 by the Respondent for participating in an illegal strike. Thus,

[30] As the Respondent notes in discussing the likelihood that the Laborers'-represented employees would support the strikes of the Teamsters and Operating Engineers on brief at 64 refers to "the foreseeable sympathy that some [Laborers'] members might feel with their operator and teamster co-workers."

[31] While the same assertion to a slightly lesser degree in light of the Operating Engineers' leading role in negotiations could be made respecting the Laborers' strike and the discharge of the striking Teamsters' represented employees, that fact neither adds to nor detracts from the analysis set forth above.

[32] No employees were discharged on Saturday, July 16, or Sunday, July 17.

[33] The dates of employment and the dates of the termination slips of Laborers' represented employees is established by uncontested business records. These employees include Arvayo, Bailon, Miranda, Ripalda, and Spean.

[34] These employees include Crater, Enriquez, Escalante, and Pete.

these individuals did not work on at least 1 day of the Operating Engineers' initial 2 day economic strike, but worked on the first day of the Operating Engineers' converted unfair labor practice strike before again ceasing work and being discharged in consequence thereof. I find that the fact that these employees did not work for at least 1 day of the Operating Engineers' initial July 14 and 15 economic strike is sufficient objective evidence of these employees' motivation to support and make common cause with the Operating Engineers and the Operating Engineers-represented striking employees to find that these Laborers'-represented employees were similarly motivated when they again ceased work after July 18. Thus I find that these employees were also sympathy unfair labor practice strikers acting in support of the Operating Engineers after July 18. Accordingly they, too, were engaged in protected conduct and their discharge for striking is also a violation of the Act based on their conduct in supporting the Operating Engineers' unfair labor practice strike.

Laborers'-represented employee, Richard Pedrosa, worked up to the day the Operating Engineers strike commenced, missed the first day of the strike, worked the second day, July 15, and did not work again. He was terminated on July 20 for engaging in an illegal strike. There is no direct evidence of his motivations for not working on either July 14 or on and after July 18. Since he worked on July 15 during the Operating Engineers' strike and stopped work the following working day when the Laborers' strike ensued, it may not be fairly concluded that his conduct on and after July 18 in striking was in support of the Operating Engineers' strike. As to Mr. Pedrosa I find that he was only honoring the Laborers' unfair labor practice strike and that his conduct was not independently protected as a result of his personal sympathetic honoring of the Operating Engineers' strike on and after July 18.

c. Summary and conclusions regarding validity of the Laborers' discharges

(1) The Laborer-represented employees terminated on July 15

I have found above that the Laborers'-represented employees terminated on July 15 were honoring the Teamsters' and Operating Engineers' strikes and picket lines and were terminated in consequence thereof. I found that no unfair labor practice strike was underway at the time of their discharge. I further found the terms of the Laborers' 1991 contracts with the Respondent remained in effect at relevant times and that the no-strike language of the agreements validly prohibited employees from engaging in economic or sympathy strikes or related withholding of their labor. Given these findings I concluded the Laborers-represented employees terminated on July 15 were engaged in unprotected activity at the time of their discharges and that the Respondent's terminations of them for that reason did not violate the Act. I therefore dismissed the relevant allegations of the complaint.

(2) The labor represented employees terminated on and after July 18

I have found that the Laborers' strike of July 18 was initiated in part in protest of the serious unfair labor practices of the Respondent in terminating some 73 Operating Engineers'-represented employees on July 15 because they honored the Operating Engineers strike. I found, therefore, the Laborers' strike was an unfair labor practice strike from its inception. I further found that the 1991 extended contract provisions of the Laborers' agreements did not limit or restrict the Laborers calling an unfair labor strike or the Laborers' represented employees from honoring or joining such a Laborers' strike. I found therefore that the Laborers'-represented employees who honored the Laborers' strike were unfair labor practice strikers engaged in protected activity. I also found that all Laborers'-represented employees who were discharged on and after July 18, including Richard Pedrosa, were honoring and/or joining the Laborers' unfair labor practice strike at the time of their discharge. I further found that in discharging the Laborers' represented employees on and after July 18 because of their protected conduct as found above, the Respondent violated Section 8(a)(3) and (1) of the Act.

I also found that all the Laborers'-represented employees discharged on and after July 18 excepting Richard Pedrosa were also honoring the Operating Engineers' unfair labor practice strike and picket line at the time of their discharge by the Respondent. I found that this was also protected activity independent of and apart from the protected activity of honoring or joining the laborer's strike and picket line. Finally, I found that all the Laborers'-represented employees discharged on and after July 18, by the Respondent for engaging in an illegal strike, except Richard Pedrosa, were discharged because of their honoring the Operating Engineers' unfair practice strike and therefore the Respondent's discharge of them also violated the Act for that reason. I therefore sustained the relevant portions of the General Counsel's complaint in these regards.

3. The issue of condonation

There is no dispute that early on Haworth on behalf of the Respondent made a determination that the discharged employees at issue herein would be eligible for "rehire." Further, both through specific one-on-one contact and solicitation and through more general word of mouth solicitation, the Respondent solicited the return to work of discharged employees from each of the crafts throughout the period following the inception of the strike. Finally, over time various discharged employees returned to the Respondent's employ.

The General Counsel and the Charging Party's argue from these facts that the Respondent had condoned any strike misconduct that occurred and that, in consequence, even if the employees' conduct was initially improper and unprotected, the Respondent may not properly assert that conduct as a basis for discharge. The Respondent argues the condonation arguments asserted against it are fatally flawed. Counsel for the Respondent asserts at 46–47 of brief:

> the General Counsel and Charging Parties misapply the doctrine of condonation, which operates to preclude employers from relying on unprotected activity that has been forgiven as a basis for *future* [emphasis in original] discharge or disciplinary action. The doctrine does not, however, transform, activity that was unprotected and illegal at the time it occurred into legal activity *nunc pro tunc*.

The Respondent is correct that the doctrine of condonation looks forward to estop the assertion by an employer of previously forgiven conduct as a basis of punishment and not backward to render discipline previously administered improper. In the instant case there is no suggestion that the Respondent ever decided to abandon its apparently uniformly applied policy during the events in question of discharging employees who were striking. The actions of the Respondent that the General

Counsel and the Charging Parties identify as constituting condonation of employee misconduct on this record, are limited to the occasions when the Respondent dealt only with the Respondent's decision that discharged individuals would be eligible for "rehire." Rehire, a term in contrast to "hire," by definition presupposes that an employee's employment has been previously severed and in the future is to be rejoined. Further, the Respondent correctly notes that there is no claim that any employee initially fired for striking and thereafter rehired has been discharged a second time or disciplined as a result of the originally asserted strike misconduct. Nor, in so far as the record reflects, has any previously discharged employment applicant been denied reemployment based on his or her strike activities.

Given all the above, as well as at the cases cited by the parties, I find that the doctrine of condonation does not apply to the instant case.[35] I further find no action of the Respondent herein at issue was rendered improper as a result of the Respondent's prior forgiveness or condonation of employee strike misconduct.

4. The allegations of violations of Section 8(a)(5) of the Act

There is no dispute that the Respondent met with each of the Charging Parties at the scheduled bargaining sessions after the strikes, announced that the period of extension of the contract which had previously been agreed to had now passed and that the contracts had expired, withdrew recognition from each Union and thereafter at least to the time of the close of the hearing failed and refused to recognize or bargain with any Charging Party respecting any of its employees. Following each final meeting, the Respondent implemented certain changes in terms and working conditions of employees heretofore in the units covered by the contracts without notification to or bargaining with the Charging Parties.

The General Counsel has alleged a variety of violations of Section 8(a)(5) and (1) of the Act respecting this admitted conduct. Those allegations and the Respondent's asserted defenses are discussed below.

a. Withdrawal of recognition—repudiation of the bargaining relationships

There is no doubt that for many years the Unions had been recognized by the Respondent as exclusive representatives of employees in the units noted. Such relationships in the usual setting create a presumption of majority employee support for the representing union in each bargaining unit and an employer is normally obligated to continue to recognize the union as the representative of unit employees and on request meet and bargain with the union respecting the terms and conditions of employment of unit employees. There are a variety of situations in which this is not the case however. The Respondent advances a series of arguments asserting that no obligation to recognize the Unions continued beyond the dates on which repudiation occurred. They are appropriately dealt with separately as below.

(1) Was the Respondent's withdrawal of recognition privileged by Section 8(f) of the Act?

The Respondent contends its withdrawal of recognition in each case occurred in bargaining relationships governed by Section 8(f) and not Section 9 of the Act and was for that reason proper under the Act. The General Counsel and the Charging Parties argue the reverse, that the relationships at issue were Section 9 relationships at relevant times and not controlled by the provisions of Section 8(f) of the Act.

(a) The distinction in an Employer's bargaining obligations under Section 9 and 8(f) of the Act

Section 9 of the Act defines a union's exclusive representation of employees in a unit as being premised on majority employee support for the union. The obligations the Act imposes on employers to bargain with unions respecting their employees in Section 8(a)(5) is subject to the provisions of Section 9 of the Act and only certain of those obligations fall on the parties to an 8(f) relationship.

Section 8(f) of the Act contains special provisions respecting bargaining relationships in the building and construction industry which do not meet the normal requirements of employee majority support or other provisions of Section 9 of the Act. A construction labor organization may therefore represent construction employees of an employer in the building and construction industry under the terms of the Act in one of two ways: (1) in a regular or "Section 9" relationship meeting the majoritarian tests of the Act under Section 9 as applied to all nonconstruction industry employers or (2) in an exceptional, building and construction industry specific 8(f) relationship wherein only the requirements of Section 8(f) as opposed to Section 9 are met.

The rights, duties, and obligations of the parties in an 8(f) relationship differ from those in a Section 9 relationship. The Board in *John Dekelwa & Sons*, 282 NLRB 1375 (1987), and in later cases, see, e.g., *James Luterbach Construction Co.,* 315 NLRB 976 (1994), holds that an employer in an 8(f) relationship with a union may, in the absence of a current collective-bargaining agreement, simply withdraw recognition of the union and avoid any further obligation to bargain under the Act.

(b) Arguments of the parties respecting the bargaining relationships at issue herein

The General Counsel and the Charging Parties argue that there are six appropriate bargaining units: One construction and one rock, sand, and gravel unit for each of the three Charging Parties. The General Counsel and the Charging Parties argue that the Unions were recognized by the Respondent as representative of the employees in the three construction units pursuant to Section 8(f) of the Act in 1980, but that in 1980 or in 1982 these relationships converted to Section 9 relationships on the demonstration to the Respondent that a majority of the em-

[35] One related line of cases is arguably relevant to the situation presented herein. Thus, for example, in *Colonial Press, Inc*., 207 NLRB 673 (1973), enf. denied 509 F.2d 850 (8th Cir. 1975), cert. denied 423 U.S. 833 (1975), the Board held an employer's postdischarge offers of reemployment made to strikers discharged for misconduct which offers were made during a continuing unfair labor practice strike acted to convert through condonation the terminated employees into unfair labor practice strikers. The Respondent notes the contrary views of the court of appeals in denying enforcement in the case as well as the possible subsequent acquiescence of the Board in similar rejections of its doctrine. See *White Oak Coal Co.,* 295 NLRB 567 (1989). Since there is no contention in the complaint and no contention made at trial that properly discharged strikers, for example the Teamsters'-represented employees herein, sought from or were denied by the Respondent any of the rights of accruing to unfair labor strikers seeking to return to work, this narrow condonation issue is not raised by the unfair labor practice pleadings and is therefore not ripe for me to decide. See, infra, in the representation case portion of this decision for revisitation of the issue in the context of voting eligibility.

ployees in each unit desired to be represented by the then recognized Charging Party. The General Counsel and the Charging Parties further argue that the three rock, sand, and gravel units are not and have never been within the building and construction industry as that term is used in Section 8(f) of the Act and therefore the bargaining relationships in place could never have been governed by the provisions of that section of the Act and therefore must be analyzed and considered as always having been Section 9 relationships.

The Respondent argues that the putatively separate rock, sand, and gravel and construction units for each of the Charging Parties are not in fact separate units. Rather the Respondent argues that there have been a total of three units: a single building and construction industry unit for each Charging Party comprising all the employees formerly represented by each craft under the paired contracts until 1994. The Respondent argues that the recognitions accorded the Unions and continued bargaining relationships respecting these three, or in the alternative six, units fell under Section 8(f) rather than Section 9 of the Act from the time initial recognition was granted in 1980 and that the bargaining relationships remained governed by the provisions of Section 8(f) as opposed to Section 9 throughout their lives.

(c) How many bargaining units are there?

There is no doubt that the Unions and the Respondent since the onset of their relationship in 1980 treated the rock, sand, and gravel, and construction units separately. Thus, they without exception negotiated separate and independent contracts with separate and independent terms and conditions of employment between rock, sand and gravel, and construction. Further, they followed the terms of the contracts providing employees different terms depending on the type of work done. There is no evidence on this record that at any time during the bargaining relationships between the parties any proposal was ever made, let alone agreed to, to merge the rock, sand, and gravel unit with the construction unit for any or all the Charging Parties. Indeed, as part of the parties' undertakings in the representations cases in this proceeding during the period after recognition had been withdrawn by the Respondent from the Unions, consent election agreements entered into by all the parties herein and approved by the Regional Director provided that separate construction units were appropriate for purposes of collective bargaining under Section 9 of the Act.

The Respondent argues that despite these circumstances, the rock, sand, and gravel and construction employees in each craft are so interrelated and commingled in their work that no true separate identity or community of interest exists sufficient to sustain separate units. The General Counsel and the Charging Parties challenge that assertion arguing that separation and independent communities of interest do in fact exist. Further, they argue that, to the extent some employees may work within both units, the work has consistently been tracked and assigned to one or the other of the two units represented by each craft because such work was at all times paid under two different contracts at differing contract rates terms.

The Board has differing standards for judging bargaining units depending on whether they are historic or prospective and also depending on the expressed desires of the parties concerning the breadth of the unit. On this record, the history of separate recognition, and bargaining as well as the separate contractual coverage throughout the period in question convinces me that the rock, sand, and gravel employees and the construction employees in each craft should be held to be in separate units, unless under Board representational law standards such units would be inappropriate even if all the parties desired such units. Applying that standard, there is no question—indeed, I do not believe the Respondent argues otherwise—that the separate units of rock, sand, and gravel employees and construction employees were appropriate during the time the Respondent continued to recognize the Unions as representatives of its employees.[36]

I find therefore that at all times material there were six bargaining units: a rock, sand and gravel unit of employees and a construction unit of employees for each of the three crafts involved herein. I further find that those bargaining units at all times material herein were appropriate for collective bargaining as defined by Section 9 of the Act.

(d) Were any of the recognition and bargaining relationships between the Respondent and the Charging Parties governed by Section 8(f) of the Act at relevant times?

I. THE ROCK, SAND, AND GRAVEL UNITS

Section 8(f) of the Act applies by its terms to: (1) employers primarily in the building and construction industry, (2) dealing with labor organizations in which building and construction employees are members, (3) concerning employees engaged in the building and construction industry. The Respondent is such an employer. The Charging Parties are such labor organizations. The issue here is whether or not the rock, sand and gravel employees involved herein are engaged in the building and construction industry.

As counsel for the Operating Engineers points out on brief, the Board has repeatedly held that the rock, sand and gravel business is not a part of the building and construction industry as that term is used in Section 8(f) of the Act citing *Forest City/Dillon-Tecon Pacific*, 209 NLRB 867, 870 (1974); *Hoover, Inc*., 240 NLRB 593 (1979); *Teamsters Local 83 (Cahill Trucking),* 277 NLRB 1286 (1985); *J. P. Sturrus Corp*., 288 NLRB 668 (1988).

Indeed a Board case arising in another context reached such a conclusion regarding the Arizona rock, sand, and gravel industry in the period just before the Respondent commenced operations. As noted supra, in 1980 the Respondent became a part of an association representing rock, sand, and gravel industry employers in the State of Arizona in bargaining with unions representing their employees, recognized the Unions as representatives of its rock, sand, and gravel employees and signed the Arizona Rock Products agreement then in place. The rock, sand, and gravel employees working under the Arizona Rock Products multiemployer 1973–1976 and 1976–1979 agreements were held not to cover construction work and to therefore be outside the coverage of Section 8(f) of the Act. *Teamsters Local 83 (Various Employers)*, 243 NLRB 328 (1979).

Based on all the above, I find that at all relevant times the employees in the three rock, sand, and gravel units of the Respondent at issue herein were not doing work within the build-

[36] My finding deals with the period before the Regional Director acting as agent of the Board approved the consent agreements noted supra which definitively established the appropriateness of the separate rock, sand and gravel and construction units as of the time of the elections in those representation cases. I regard the representation case unit determinations as binding upon me for that later period.

ing and construction industry as that term is used in Section 8(f) of the Act. It follows that the relationship between the Unions and the Respondent respecting those units could not be governed by Section 8(f) of the Act but must meet the tests of Section 9 of the Act.

Given the finding that Section 9 is the controlling statutory prism through which to view and evaluate the parties' relationships respecting the rock, sand, and gravel units, I find that those relationships during the 1991–1994 contracts must be treated as valid 9(a) relationships. This is so because under the Supreme Court's decision in *NLRB v. Bryan Mfg. Co*., 362 U.S. 411 (1960), a contract between an employer and a union governed by Section 9(a) as opposed to Section 8(f) of the Act will be irrefutably presumed to be valid and the union to have properly represented a majority of employees at the time the contract was entered into if, as herein, the contract was more than 6 months old at the time it was under challenge as a minority contract.[37]

Having found as a matter of law that the contracts were valid, applying traditional Board law applicable to nonbuilding and construction units, I further find that the Unions enjoyed a presumption of continuing majority status following the expirations of the contracts. This being so, the Respondent could not, as a matter of right and without overcoming the presumption of continuing majority representation in each Charging Party unit, simply withdraw its longstanding recognition of each Charging Party as the exclusive representative for purposes of collective bargaining of the employees in the relevant rock, sand and gravel unit.

II. THE CONSTRUCTION UNITS

There is no dispute that the three units described herein as construction units meet all the tests described, above, for qualification under Section 8(f) of the Act. The Board presumes that the recognition and subsequent bargaining relationship between unions and employers in such construction units is established under Section 8(f) of the Act rather than Section 9(a) of the Act unless and until proved otherwise. *Casale Industries*, 311 NLRB 951 (1993).

The General Counsel and the Charging Parties contend, however, that the instant three construction unit relationships were clearly changed into 9(a) relationships beginning in 1980 or, in the alternative, on and after 1982 and that nothing thereafter occurred to derogate from that status. The Respondent challenges the arguments of the General Counsel and the Charging Parties with respect to the legal significance of the 1980 and 1982 events.

The General Counsel and the Charging Parties argue that the Respondent both as they hired given employees starting in 1980 and in June 1982 as part of a process in which all of its employees were required to reapply for employment, had its employees, including the employees in the three units in question herein, fill out the Respondent's "Employee Record" Form 107.[38] These forms had a section designated with the caption "Union" in which one of three boxes could be checked: "Northern California Union," "Southern California Union," or "Other Area." Following those choices the form provides a series of checkoff boxes containing different craft union titles, e.g., Engineers, Laborers, Teamsters, Carpenters, and Other. Finally the word Local followed by an underlined space: "Local _____," was provided on the form to enter the appropriate trade union local number. The parties stipulated that in 1980 and in 1982, the majority of employees in each of the units involved herein designated the relevant Charging Party[39] in the spaces noted above on the forms.

The General Counsel and the Charging Parties argue these forms were (1) a poll of employee sentiments respecting union representation and (2) the filled out forms were designations of support for the Unions which in their totality were notice to the Respondent of the Unions' majority support in each unit and established or converted the bargaining relationships as or to Section 9(a) relationships. The Respondent challenges the assertion that the entries were ever intended by the employees or the Unions to be designations of majority support. The Respondent also challenges that the forms were ever recognized by the Respondent as a designation by employees of their wishes respecting union representation for purposes of collective bargaining. Rather the Respondent contends the forms were intended to solicit and record information from employees to be used in the Respondent's payroll accounting functions. The Respondent further argues the information on the forms and the forms themselves were used exclusively for that purpose at all times. Finally, the Respondent argues that at no time did any Charging Party ever claim that it represented a majority of employees in a unit at issue herein and at no time was any reference made to the Form 107 entries or any other evidence as supporting such a claim of majority.

The Board in dealing with construction industry relationships held in *Precision Striping*, 284 NLRB 1110 , 1112 fn. 6 (1987):

> [6] An employer-conducted poll *prior* [emphasis in original] to initial recognition may, in proper circumstances, establish a full Section 9 bargaining relationship. *San Clemente Publishing Corp*., 167 NLRB 6 (1967); see [*John*] *Deklewa* [*& Sons*, 282 NLRB 1375 (1987)] at 1387 fn. 53.

Applying the requirements of *Precision Striping*, it is clear there was never a poll conducted prior to initial recognition. The 1980 Form 107's at issue herein were filled out as employees were in the process of being hired. The record is clear that in 1980 the Unions had been recognized before any employees were hired. This being so, the Respondent's initial recognition of each Union in the construction units in 1980 was clearly under Section 8(f). Thus the 1980 or the 1982 events may not be judged in a prerecognition setting where a union's demand for initial recognition or the employer's consideration of granting of initial recognition was at issue.

What is involved herein are events that took place in the context of an existing 8(f) recognition by the Respondent of the Charging Parties. Judging the events of 1980 and 1982 in this context, I find that neither the 1980 forms nor the 1982 forms

[37] The Court reasoned that since Sec. 10(b) of the Act precludes the finding of an unfair labor practice more than 6 months preceding the filing of a charge, a contract more than 6 months old may not be attacked as invalid by means of a claim that the union committed an unfair labor practice by entering into contract at a time it did not represent a majority of employees.

[38] The form was the Respondent's data form used to initially record its employees' names, addresses, social security, and tax information as well a certain other information.

[39] Designations included predecessor or constituent locals of the Charging Parties herein.

may properly be held to be a showing of majority support for the Charging Parties in the relevant units. I make this finding for several reasons. First, in the absence of an initial recognition context, it is not clear that such a poll would be sufficient under Board cases. There are sound reasons why such a non-initial recognition setting should make it more difficult to find particular events will charge an employer with knowledge of employee sentiments in favor of union representation. A non-initial recognition context makes it more likely that the employer, in the absence of clear and unambiguous circumstances, will not be looking to employee sentiments inasmuch as the recognition having been previously granted is not in issue.

This is particularly true in the instant case where the designations are ambiguous on their face as expressions of employee union support and the Respondent offered evidence to show that it had not viewed the information entered on the forms as designations of employee support for the already recognized bargaining representatives. The likelihood that there was neither conscious employee expressions of support for the Union or an employer appreciation of the nature of the argued assertions is substantially enhanced where, as the Respondent notes, there was no specific demand by any Charging Party for a new and different, majority-based 9(a) recognition.

Given all the above, I find that the proof required under *Casale Industries*, 311 NLRB 951 (1993), to establish a 9(a) relationship respecting the construction units herein has not been established. I find therefore that at all times material herein the recognition afforded each of the Charging Parties respecting the three craft construction units was pursuant to Section 8(f) of the Act. I find that such a relationship does not extend a presumption of employee majority support beyond the life of the contract. Accordingly, the Respondent was not obligated to continue to recognize nor meet and bargain with the Charging Parties respecting the three construction units after the expiration of the 1991–1994 contracts as extended.

(e) Conclusions respecting Respondent's right to withdraw recognition pursuant to Section 8(f) of the Act

I have found that the rock, sand, and gravel units represented by each Charging Party are not within the building and construction industry and therefore are not and have not been governed by the provisions of Section 8(f) of the Act. Accordingly I find that the Respondent may not rely on the provisions of Section 8(f) of the Act to justify its conduct in withdrawing recognition of the Charging Parties as the exclusive representatives of the employees in these units.

I have also found that the recognition afforded each Charging Party by the Respondent as exclusive representative of the employees in the relevant construction unit was established and maintained at all times thereafter pursuant to the provisions of Section 8(f) of the Act and did not change to a recognition governed by Section 9(a) of the Act. Accordingly, the Respondent could withdraw recognition or any or all the Charging Parties as representative of the construction units at any time following the expiration of the extended 1991–1994 construction agreements. I shall therefore dismiss the complaint allegations as to these latter units.

(2) Was Respondent's withdrawal of recognition privileged based on a good-faith doubt of the Unions' continuing majority support among unit employees?[40]

The Board with court guidance and approval holds that an employer may rescind and withdraw recognition of a union as representative of its employees, if the withdrawal of recognition was based on a reasonably grounded doubt as to the union's continued majority support among unit employees, if that doubt is asserted in good faith, based on objective considerations and raised in a context free of employer unfair labor practices.

The predicate finding to consideration of the particular factors advanced as justifying and supporting the employer's doubts as to the union's majority is that the employer's doubt were in fact related to the withdrawal of recognition. It is at this threshold level that the Respondent's arguments founder. The Respondent, as noted supra, repudiated its recognition of the Charging Parties on the days it believed each contract expired.[41] It did so at meetings with the Charging Parties in which, in effect, its hand-delivered letters spoke for it. The letters unambiguously asserted the Unions' earlier bargaining and the strikes were the entire cause of the Respondent's withdrawals of recognition. No expressions of doubt respecting the Union's continuing majority as to any unit was included in the letters or discussed at the meetings. Further the entire record is consistent with this single motive.

Given all the above and in consideration of the record as a whole, I find that Respondent's argued doubts respecting any Charging Party's continuing support among any unit's employees were simply not a factor whatsoever in the Respondent's decision to withdraw recognition for the Charging Parties in the six units at issue herein. Accordingly, the entire defense of good faith doubt to the withdrawal of recognition allegations in the complaint is rejected.

(3) Was the Respondent's withdrawal of recognition privileged based on union misconduct?

The Respondent on brief has marshaled a series of cases which stand for the proposition that, when a union has engaged in misconduct such as engaging in an unprotected or illegal strike, an employer may in certain circumstances withhold

[40] The Respondent alleged a good–faith doubt as to the Unions' majority of support in the rock, sand, and gravel units in its amended answer. It adduced certain evidence at trial respecting expressions of employees sentiments regarding the Unions to Respondent's agents. The defense of a good-faith doubt in a union's majority status was discussed and was the basis for evidentiary arguments and rulings at trial. The Respondent's posthearing brief, although very comprehensive, does not argue a good faith belief as a defense to the 8(a)(5) violations alleged in the amended complaint. The brief does recite, without indicating a withdrawal of the defense, its amended answer's assertion of a good-faith doubt as to the Union's majority in the rock, sand, and gravel units. That being so, although I have some doubt that the Respondent is actively pursuing the defense, I shall address it here.

[41] The letters made it clear that the Respondent's view was that the contracts extended to the conclusion of the individual meetings under discussion herein. The Respondent made it clear that no new employees had been hired as of the time of these meetings.

bargaining and properly engage in certain actions which in other circumstances would violate the Act including *Dow Chemical Co.,* 212 NLRB 333, 341 (1974); *California Cotton Cooperative Assns., Ltd.,* 110 NLRB 1494 (1954); *Marathon Electric Mfg. Corp*., 106 NLRB 1171 (1953*),* enfd. sub nom. *Electrical Radio & Machine Workers of America v. NLRB*, 223 F.2d 338 (D.C. Cir. (1955), cert. denied 350 U.S. 915 (1956); *United Elastic Corp.*, 84 NLRB 768 (1949). These cases also apply to certain 8(a)(1) allegations of the complaint discussed, infra.

The Respondent seems to argue that these cases also permit an employer in some circumstances not only to withhold bargaining with a union which has initiated or supported an illegal strike but, further, to withdraw recognition of the union as representative of the employer's unit employees in sole consequence of the union's misconduct. This is an overreading of the Respondent's cited cases[42] and without support in Board doctrine. Accordingly, I find that no Charging Party misconduct in striking or in supporting the strikes of the others herein could or did in fact justify the Respondent's withdrawing recognition or act under any equitable doctrine to estop the Charging Parties from complaining respecting such withdrawals of recognition. Thus, this theory of the Respondent asserted in its defense is rejected.

(4) Was the Respondent's withdrawal of recognition privileged based on the Charging Party's actual loss of majority support in any unit at issue herein

While I have rejected, supra, the concept seemingly asserted by the Respondent that its withdrawal of recognition of the Charging Parties was justified because of their misconduct in striking and supporting the strikes of the others, there is an analysis in the Board's decision in *Marathon Electric Mfg. Corp*., 106 NLRB 1171 (1953), a case advanced by the Respondent, which must be addressed.

The General Counsel alleges that the Respondent violated Section 8(a)(5) of the Act with respect to the units at issue herein and alleges that the Charging Parties represented a majority of employees in each unit at all times there was a bargaining obligation violation of Section 8(a)(5). The existence of such majority support is a requirement for finding a violation of Section 8(a)(5) of the Act in this setting. The Respondent denied these majority allegations in its amended answer.

In *Marathon*, a union called a strike in breech of the contract. The employer thereafter discharged 546 out of 550 unit employees for engaging in an improper strike and canceled its recognition of the union. The Board found the discharges were not in violation of the Act. Further, the Board held that, in the circumstances of the case, where the number of employees had been reduced to a level of less than one percent of the regular staff, the unit no longer contained a substantial and representative compliment of employees and therefore the employer's cancellation of its recognition of the union was not improper. 106 NLRB at 1181–1182.

Applying that analysis to the units in the instant case in light of the findings, supra, concerning the validity of the strikes and discharges preceding the Respondent's withdrawal of recognition, I make the following findings.

The Operating Engineers did not engage in an illegal strike and the discharged employees were discharged in violation of the Act. These events therefore could not, as a matter of law, derogate from the Operating Engineers' majority support in the unit. The discharged employees remained part of the unit for all purposes relevant here. Thus, this defense is not sustained as to the two Operating Engineers' units.

The Laborers' unit experienced depletion through discharge in the period July 1525, but only 14 of the discharges were permissible.[43] The improper discharges, as noted above, do not fatally reduce the unit compliment. The depletion of the unit occurring as a result of the discharges sustained, above, were not of a magnitude and proportion sufficient to hold that the Laborers no longer represented a majority of employees in either unit for that reason

The Teamsters' units, as in *Marathon*, suffered very substantial depletion in both the rock, sand, and gravel, and construction units as a result of the terminations of July 15. As to each unit, I reach the same conclusion reached in *Marathon*, that as a result of the discharges the units did not have a substantial and representative compliment of employees during the period extending from the date of the discharges on July 15 to the date the Respondent withdrew recognition on July 25.[44] Thus, at the time the Respondent withdrew recognition from the Teamsters as representatives of the two Teamsters' units, neither unit possessed actual majority support for the Teamsters' sufficient to support a bargaining obligation.

(5) Summary and conclusions respecting withdrawal of recognition

Summarizing the holdings above, I have found that at all relevant times there have been six appropriate bargaining units at issue herein: three construction units and three rock, sand, and gravel units.

I found the Respondent was privileged as a matter of right to withdraw recognition from each Charging Party respecting its construction unit. This was so because I determined that at all relevant times these three units were represented by the Charging Parties pursuant to the provisions of Section 8(f) and not Section 9(a) of the Act and that no contract was in force at the time of withdrawal. The Board holds employers may withdraw recognition of unions in such circumstances at will.

I found the Respondent was not privileged as a matter of right to withdraw recognition from each Charging Party respecting its rock, sand, and gravel unit. This was so because I determined that at all relevant times those three units were represented by the Charging Parities pursuant to the provisions of Section 9(a) and not Section 8(f) of the Act. I rejected the Respondent's asserted defense that it had a good-faith doubt that the Unions' represented a majority of employees in the units governed by Section 9(a) of the Act at the time it withdrew recognition. I also rejected its asserted defense that the misconduct of each Charging Party in improperly striking or supporting the strikes of the others justified its withdrawal of recognition.

[42] See however the further discussion and application of *Marathon* to the issue of actual union majority support, in the immediately following section of this decision.

[43] Perhaps three Laborers were rock, sand, and gravel unit employees

[44] The Respondent offered unchallenged testimony that no new employees were hired in any unit until the Respondent canceled the contract at the first bargaining sessions following the strikes. Those sessions were also the occasions for the Respondent withdrawing recognition from each Charging Party.

I found under the Board's *Marathon* majority analysis that the Teamsters' units did not have a substantial and representative complement of employees at the time the Respondent withdrew recognition and that, accordingly, the Respondent had no bargaining obligation at the time it withdrew recognition in either unit. I found that sufficient employee complements were extant at all relevant times in each of the Operating Engineers' and Laborers' units.

Given all of the above, I find that the Respondent did not violate Section 8(a)(5) and (1) of the Act when it withdrew recognition from the Teamsters respecting the construction unit and the rock, sand and gravel units heretofore represented by it. These allegations of the complaint will be dismissed.

I find that the Respondent did not violate Section 8(a)(5) and (1) of the Act when it withdrew recognition from the Operating Engineers respecting its construction unit, but that it did violate Section 8(a)(5) and (1) of the Act when it withdrew recognition of the Operating Engineers as representative of the rock, sand and gravel unit. Therefore, the former allegation of the complaint shall be dismissed and the latter sustained.

Similarly, I find that the Respondent did not violate Section 8(a)(5) and (1) of the Act when it withdrew recognition from the Laborers respecting its construction unit, but that it did violate Section 8(a)(5) and (1) of the Act when it withdrew recognition of the Laborers as representative of its rock, sand and gravel unit. Therefore, the former allegation of the complaint shall be dismissed and the latter sustained.

b. Failure to meet and bargain and implementation of unilateral changes

Following withdrawal of recognition of the Charging Parties in each of the units involved herein, the Respondent admittedly refused to recognize or meet and bargain with any Charging Party despite their requests that bargaining continue. There is no dispute that the Respondent thereafter unilaterally implemented changes in terms and conditions of employment of employees in each unit. The General Counsel's complaint alleges these actions were violations of Section 8(a)(5) and (1) of the Act. Because of the findings earlier made, it is appropriate to address the allegations as follows.

(1) The construction units

I found, supra, that the construction units were governed by Section 8(f) of the Act and that no presumption of majority support for the representing union existed with respect to these units after the expiration of the contracts which were coincident with the Respondent's withdrawals of recognition. I therefore found that the Respondent was entitled to withdraw recognition from each Charging Party with respect to the construction unit previously represented by it.

Consistent with that analysis, after the withdrawal of recognition the Respondent had no obligation to further bargain with the Charging Parties respecting the construction units and could unilaterally implement whatever changes it desired in construction unit employees' terms and conditions of employment. The Respondent has therefore not violated Section 8(a)(5) of the Act as alleged. I shall therefore dismiss these allegations of the amended complaint.

(2) The rock, sand, and gravel units

(a) The Teamsters' unit

I found, above, that at the time the Respondent withdrew recognition from the Teamsters respecting its units,[45] the units did not possess substantial and representative compliments of employees and therefore the Respondent had no obligation to recognize and bargain with the Teamsters. Consistent with that analysis, after the withdrawal of recognition of the Teamsters as representative of employees in the Teamsters rock, sand, and gravel unit, the Respondent had no obligation to further bargain with the Teamsters respecting its rock, sand, and gravel unit and could unilaterally implement whatever changes it desired in that unit's employees' terms and conditions of employment. The Respondent has therefore not violated Section 8(a)(5) of the Act as alleged. I shall therefore dismiss these allegations of the amended complaint.

There is a second basis for dismissing the failure to meet and bargain and unilateral change allegations respecting the Teamsters units. The Respondent on brief cites a panoply of cases for the proposition that a union's illegal strike justifies employer responding conduct including an employer's suspension of bargaining during the period of the illegal strike as well as an employer's making of unilateral changes in working conditions of employees working during the strike. *Dow Chemical Co.,* 212 NLRB 333, 341 (1974); *California Cotton Cooperative Assns.,* 110 NLRB 1494 (1954); *Marathon Electric Mfg. Corp*., 106 NLRB 1171 (1953*),* enfd. sub nom. *Electrical Workers UE v. NLRB*, 223 F.2d 338 (D.C. Cir. 1955), cert. denied 350 U.S. 915 (1956); *United Elastic Corp.*, 84 NLRB 768 (1949).

The Teamsters' strike was found, supra, to be in violation of the terms of the extended contracts and the strike was never called off insofar as this record indicates.[46] Accordingly, the Respondent during the entire period covered by the complaint allegation was never obligated to resume bargaining with the Teamsters. Thus, its continuing failure to meet and bargain and its implementation of unilateral changes in Teamsters' units for this reason as well did not violate Section 8(a)(5) and (1) of the Act. I shall therefore dismiss these allegations of the complaint on this basis as well.

(b) The Operating Engineers' unit

I have found, supra, that the Operating Engineers represented the Operating Engineers rock, sand, and gravel unit pursuant to Section 9(a) of the Act.[47] Thus, after the contract expired the Operating Engineers' enjoyed a normal presumption that a majority of unit employees desired representation and, absent a valid defense, the Respondent remained obligated to recognize and bargain with the Operating Engineers respecting that unit. I rejected all the Respondent's asserted defenses to this obliga-

[45] This analysis therefore also applies to the Teamsters' construction unit. It is not necessary to emphasize that point in light of my earlier findings that under Sec. 8(f) of the Act, the Teamsters' no longer represented the construction unit at the time the Respondent withdrew its recognition.

[46] The Board held in *Arundel Corp*., 210 NLRB 525 (1974), that a strike in violation of the no-strike provisions of a contract could not change in character, i.e., convert to an economic or unfair labor practice strike, until the strike was terminated and the status quo ante restored citing *Electrical Workers UE v. NLRB*, 223 F.2d 338, supra.

[47] This analysis would also apply to the Operating Engineers' construction unit, but for my earlier finding that the construction unit was governed by Sec. 8(f) rather than Sec. 9(a) of the Act.

tion, supra, finding the Respondent's withdrawal of recognition of the Operating Engineers as representative of the Operating Engineers rock, sand, and gravel unit was a violation of Section 8(a)(5) of the Act.

That analysis applies to the allegations herein. The Respondent's obligations included, as all obligations established under Section 9(a) and governed by Section 8(a)(5) of the Act, the obligation to meet and bargain with the representing union concerning terms and conditions of represented employees. The Act also requires an opportunity be provided to the union by the employer to bargain before changes in those terms and conditions are implemented.[48] I find therefore that the Respondent in failing to meet and bargain with the Operating Engineers on and after its withdrawal of recognition of the Operating Engineers as the representative of the rock, sand, and gravel unit and its unilateral implementation of changes in working conditions in that unit violated Section 8(a)(5) and (1) of the Act. The complaint in these regards shall be sustained.

(c) The Laborers' unit

The Respondent argues that the Laborers' Union did not take the affirmative actions required under its contracts to stop the Laborers' represented employees from honoring the strikes conducted by the Teamsters and the Operating Engineers on July 14 and 15, 1994. Thus, the Respondent notes the no-strike provision of the rock, sand, and gravel agreement asserts that the Laborers Union will not,

> cause, permit or authorize in any fashion, nor will any member of the Union take part in any strike . . . sympathy, or any other kind of strike .

The record suggests that when the Laborers' agents were asked by Laborers'-represented employees what to do during the Operating Engineers and Teamsters July 14 and 15 picket lines and strike, they responded, in effect, that while the Laborers' were not on strike, the employees had to decide on their own what they wanted to do.

Assuming, without deciding, that the Laborers were obligated to affirmatively discourage represented employees to disregard the July 14 and 15 picket lines and strike and failed to do so, I do not find this misconduct may be held akin to the affirmative solicitation of employee support of and participation in illegal strikes, or the actual calling of a strike and establishment of picket lines by the unions in the cases cited, supra. Thus I do not find that the sanctions against the unions allowed in those cases or the allowance of certain types of normally prohibited employer conduct rendered permissible as a result of union misconduct in those cases properly apply to the Laborers' Union or to the Respondent's dealings with the Laborers' Union herein. Thus, the fact that the Laborers' may have not taken sufficient affirmative action to discourage employee support for the July 14 and 15 Operating Engineers' and Teamsters' strikes, may not on this record privilege any of the Respondent's actions on and after it withdrew recognition of the Laborers' as representative of the appropriate rock, sand, and gravel unit almost 2 weeks later and many days into the Laborers' unfair labor practice strike, as found, supra.

[48] While circumstances exist in some cases where implementation of changes in a context free of employer unfair labor practice following a bona fide impasse in bargaining are not impermissible, no realistic argument may be made on this record that such was the case respecting the Operating Engineers' rock, sand, and gravel negotiations.

Given this finding, my analysis proceeds as did that respecting the Operating Engineers which is set forth immediately above and will not be repeated here. I find therefore that the Respondent in failing to meet and bargain with the Laborers on and after its withdrawal of recognition of the Laborers as the representative of the relevant rock, sand, and gravel unit and its unilateral implementation of changes in working conditions during that period respecting that unit violated Section 8(a)(5) and (1) of the Act. The complaint in these regards shall be sustained.

(d) Summary

I have found above that the Respondent did not violate Section 8(a)(5) and (1) of the Act respecting its post contract withdrawal of recognition of the Unions, failures to meet and bargain with the Unions and its unilateral changes in terms and conditions of employment of employees in the following units: The Charging Party Teamsters' construction and rock, sand, and gravel units, the Laborers' construction unit and the Operating Engineers' construction unit. The applicable complaint allegations shall be dismissed.

I have found above that the Respondent violated Section 8(a)(5) and (1) of the Act respecting its post contract withdrawal of recognition of the Unions, failure to meet and bargain with the Unions and its unilateral changes in terms and conditions of employment of employees in the following units: The Charging Party Operating Engineers rock, sand, and gravel unit and the Charging Party Laborers rock, sand, and gravel unit. The applicable complaint allegations are sustained.

5. Independent allegations of violations of Section 8(a)(1) and (5) of the Act

The General Counsel's complaint at paragraph 17 alleges various conduct during the strike by the Respondent's agents in 16 subparagraphs: 17(a) through (p). The allegations address several general classes of conduct. First, the complaint alleges various threats to strikers and picketers that they would be discharged, receive reduced wages or lose seniority if they did not cross the picket lines, abandon the strike and return to work.[49] Second, the complaint alleges various statements by the Respondent's agents that the Unions were out, out for good, done or would never get back in or return to the workplace.[50] Third,

[49] Complaint subpar. 17(a) asserts that on or about July 14, 1994, the Respondent, by Wayne Embry at the Respondent's Ehrenberg, Arizona plant, threatened to discharge its employees if they refused to cross the picket lines of the Operating Engineers and the Teamsters. Subpar. 17(b) asserts that on or about July 14, 1994, the Respondent, by Dave Richards on the telephone, advised an employee that if said employee would not cross the picket line in the cab of Richard's truck concealed with a blanket, he would be terminated. Complaint subpar. 17(f) asserts that on or about July 25, 1994, the Respondent, by Paul Polito at one of the Teamsters' or Operating Engineers' picket lines told employees that if the employees did not return to work by July 30, 1994, the employees would be treated as new hires making a dollar less than scale. This conduct is also alleged in the complaint at par. 19(a) to violate Sec. 8(a)(5) of the Act.

[50] Complaint subpar. 17(c) asserts that on or about July 18, 1994, the Respondent, by Wayne Embry at the Respondent's Ehrenberg, Arizona plant, informed its employees that it was going nonunion. Complaint subpar. 17(d) asserts that on or about July 21, 1994, the Respondent, by Wayne Wells at one of the Teamsters or Operating Engineers picket lines told employees that the Union was out and was never going to return. Complaint subpar. 17(e) asserts that on or about July 24, 1994, the Respondent, by Steve House at one of the Teamsters or Operating

the complaint alleges a series of things offered to strikers to cause them to return to work including better wages, improved benefits, profit sharing, superior equipment and employment, for a relative.[51] Fourth, and finally, subparagraph 17(j) asserts that on or about August 9, 1994, the Respondent, by Andy Wash and Doug Sturgess at the picket line near the Pima Cyprus Copper Mine, erected a construction zone in an attempt to weaken the effect of the picketing and attempted to remove pickets from the entrance to the site.

While the parties contested the allegations vigorously on their facts and adduced various and sometimes contradictory versions of events, the parties also contended, correctly, that the conduct at issue had to be placed in the context of events and that certain actions were either permissible or impermissible depending on, for example, the legality of the strikes involved and the bargaining obligations of the Respondent at relevant times respecting particular units of employees. These basic four groups of allegations noted above will be addressed separately.

a. The inducement to return allegations of 8(a)(1) and (5) violations of the Act

The General Counsel and the Charging Parties argue that an employer's offers of inducements to striking employees to return to work during a strike violates Section 8(a)(1) of the Act and further violates Section 8(a)(5) and (1) of the Act as a form of direct dealing with employees bypassing their exclusive representative for purposes of collective bargaining. The Respondent, relying on the improper union strike cases cited supra, argues that in the face of an illegal strike not only is an employer permitted to induce illegal strikers to return to work, but there is no obligation of the part of the employer to bargain with the union during such times and, therefore, no violation of Section 8(a)(1) or Section 8(a)(5) and (1) of the Act may be found irrespective of any possible resolution of the disputed events underlying the allegations of illegal inducement. Each position correctly asserts current Board doctrine, but the application of those holdings to the facts of this case is somewhat complex.

I have found that the Teamsters' strike at its inception was in breech of the no-strike provisions of the extended collective-bargaining agreements. I further found that the Teamsters' strike remained at all times an illegal strike. In these circumstances, I find, in agreement with the Respondent's arguments and cases cited on brief, the Respondent at no relevant time had an obligation to bargain with the Teamsters and could offer whatever terms and conditions of employment to the striking as well as job applicant driver construction unit and rock, sand, and gravel unit members it wished. Further, the Respondent could with essential impunity induce these specific individuals to abandon their improper strike and return to work. As to the Teamsters'-represented employees, the Respondent's defense is essentially complete.

I have found that the Operating Engineers' strike was economic on July 14 and 15 and an unfair labor practice strike thereafter. I found that the Respondent had no obligation to recognize the Operating Engineers as the representative of its operators' construction unit after it withdrew recognition on July 25. I further found, however, that it remained at all times obligated to recognize and bargain with the Operating Engineers as the exclusive representative of its employees in the operators' rock, sand, and gravel unit under Section 9(a) of the Act. Given these findings, the Respondent could not properly induce any of these rock, sand, and gravel unit employees to return to work through the offer of terms and conditions of employment different that those properly applicable to workers who did not go on strike, but who rather continued to work.

The situation respecting the Laborers' employees is more complex. The Laborers'-represented employees who honored the Teamsters' and Operating Engineers' strike of July 14 and 15 were not engaged in protected activity and the Respondent could, consistent with the analysis of the Teamsters situation above, offer inducements to those employees. After July 15, the Laborers' strike was an unfair labor practice strike and such employer conduct was not permitted. So, too, the Respondent's bargaining obligations respecting the Laborers' construction contract ended with its withdrawal of recognition at the expiration of the contract, but did not end and continues to date with respect to the Laborers' rock, sand, and gravel unit.

It is possible with the Respondent's payroll records in evidence for the relevant period, to resolve the credibility conflicts respecting these complaint allegations, determine based on the dates of the occurrences the nature of the strike and the Respondent's bargaining obligations at any given time concerning the employees involved in the particular incident as well as the unit placement of those employees. If the General Counsel meets his burden of proof respecting the factual allegations of any particular complaint subparagraph and, if the Respondent's asserted "context" defenses do not apply to that situation, a

---

Engineers picket lines informed employees that the Union was done and the strike was over with. Complaint subpar. 17(h) asserts that on or about August 22, 1994, the Respondent, by Doug Sturgis at one of the Teamsters' or Operating Engineers' picket lines told employees that the Union was out for good. Complaint subpar. 17(i) asserts that on or about September 8, 1994, the Respondent, by Andy Wash at one of the Teamsters or Operating Engineers picket lines told employees that the Union was definitely out; that the Respondent needed to do away with the Union; that the Union would never get back in; and that Ted Haworth had a vendetta against one of the business agents of the Operating Engineers.

[51] Complaint subpar. 17(g) asserts that in or about mid-August 1994 the Respondent, by Rene Redondo at one of the Teamsters or Operating Engineers picket lines attempted to induce employees to cross the picket line by offering them their jobs back and promising that they would receive the same profit sharing that he enjoyed. Complaint subpar. 17(k) asserts that on or about the end of August 1994, the Respondent, by Andy Wash at the home of a striker, solicited the striker to return to work and described benefits that the Respondent was offering to returning strikers. Complaint subpar. 17(l) asserts that a few days after July 14, 1994, the Respondent, by Terry Wright, solicited a striker to return to work; and on or about mid-September 1994 solicited the same striker to return to work with an offer of higher pay than the striker was earning before the strike began. Complaint subpar. 17(m) asserts that on or about July 16, 1994, the Respondent, by Wayne Embry, solicited a striker to return to work and promised a job to the striker's son. Complaint subpar. 17(n) asserts that on or about September 8, the Respondent, by Danny Hoback, solicited a striking employee to cross the picket line to return to work with a promise of better wages and the use of an air-conditioned piece of equipment. Complaint subpar. 17(o) asserts that on or about July 17, 1994, the Respondent, by Steve House, solicited a striking employee to cross the picket line to return to work with the promise of increased wages and company benefits. Complaint subpar. 17(p) asserts that near the end of August or beginning September 1994, the Respondent, by Andy Wash, solicited a striking employee to return to work by the use of the incentive of the Respondent's profit-sharing plan. This conduct is alleged in the complaint at par. 19(a) to violate Sec. 8(a)(5) of the Act.

violation of Section 8(a)(1) and/or 8(a)(5) and (1) of the Act may be found and, consistent with Board decisional law, a proper cease-and-desist and notice remedy be included in the final remedy directed. Given the complex and numerous violations earlier found and rejected, I find however that any such additional violations found in this portion of the complaint would not add to the scope of the violations found nor enhance or augment the remedy directed herein.

As I have found supra, the Respondent has violated Section 8(a)(5) and (1) of the Act with respect to the Laborers' and the Operating Engineers' rock, sand, and gravel units by withdrawing recognition of the Unions, thereafter failing and refusing to meet and bargain with them and unilaterally implementing different terms and conditions of employment for unit employees. These new terms and conditions of employment were admittedly on offer to all striking individuals and were accepted by returning strikers and others. The remedy, including notice language provided for these more general 8(a)(5) violations found, will already include all that would properly be included in a notice remedying the individual allegations in complaint paragraph 17 respecting improper inducement.

Given all the above, I find that further analysis and consideration of the illegal inducement portions of complaint paragraph 17, whatever a final resolution of the factual[52] and legal issues might be, would not effect the violations found or the remedy[53] directed herein. Further consideration of the allegations would without however burden the instant decision and delay its issuance. Accordingly, I shall not further consider the inducement allegations of paragraph 17 of the complaint.

b. The allegations of threats of discharge and statements the Union's did not represent employees

My analysis of the discharge threat elements of paragraph 17 of the complaint parallel those set forth above respecting the inducement to strike complaint allegations. It is not improper for an employer to threaten to discharge an employee if he does not abandon an unprotected strike if, in fact, that employee is engaged in an illegal strike. Conversely, such conduct clearly violates the Act, if the employee is on an unfair labor practice strike. In the same vein, if recognition of a union had been properly withdrawn, as was true respecting the construction units and as to the Teamsters' rock, sand, and gravel unit, as Respondent argues, it is not impermissible for an employer's agents to tell the discharged employees the union was out. A violation occurs in the same circumstance if the union continues to represent employees, i.e., is not out.

As found, above, all the terminated Operating Engineers'-represented employees and approximately half the terminated Laborers'-represented employees were in fact wrongfully discharged and were told, in writing, that they were discharged because they participated in the strike. The Respondent made no secret of the fact and directly or indirectly informed the Charging Parties, the strikers, job applicants, and new hires that it was no longer recognizing the Unions or bargaining with them. As to some of the employees and Unions, as set forth with particularity, supra, these actions are part of the violations found and will be remedied in the notice, infra. Thus, the complaint paragraph 17 discharge threat allegations are but additional contested allegations of things found improper earlier as noted above.

Again, the events in contest in complaint paragraph 17's discharge threats and assertion that the unions were out allegations, in what ever way they are resolved, will not materially add to the broad categories of violations found nor will they add to the remedy directed. Accordingly, and also for the reasons noted supra, I shall not further consider these additional allegations of paragraph 17 of the complaint.

c. Complaint subparagraph 17(j)

The final subparagraph of paragraph 17, not discussed above, is subparagraph 17(j) which alleges that on or about August 9, 1994, the Respondent, by Andy Wash and Doug Sturgess at the picket line near the Pima Cyprus Copper Mine, erected a construction zone in an attempt to weaken the effect of the picketing and attempted to remove pickets from the entrance to the site.

The testimony indicates that on or about August 9, Superintendent Andy Wash and Foreman Doug Sturgis placed temporary highway warning signs on Pima Mine Road, a paved public road, before and after the intersection of a dirt and gravel access road which runs to a location at which the Respondent was maintaining operations, from which the Respondent was hauling materials and at which the Unions were picketing.

There is no dispute that large multiaxle "belly dump" material haulers were regularly using the access and paved roads and that pickets were seeking to impede the Respondent's operations. Sturgis testified that he received complaint from truckers of possible safety problems caused by the pickets and became concerned that motorists on Pima Mine Road could be at risk in dealing with the trucks entering and leaving the access road. Sturgis expressed his worries to Wash who erected temporary "Truck Crossing" signs on Pima Mine Road some distance in each direction from the access road intersection.

Thereafter Wash spoke to the Operating Engineers' picket captain Thomas Tynes and asked that the pickets be moved behind the signs, i.e., at some distance from the Respondent's operations and away from the trucks turning off and onto Pima Mine Road. Tynes declined to move the picketing. Wash made a similar request to Charging Party Operating Engineers' representative Henry Montaño who also declined. Respondent's agents thereafter abandoned efforts to move the pickets.

The General Counsel argues that the Respondent's erection of the road construction sign was an improper attempt to interfere with the employees' picketing and therefore violates Section 8(a)(1) of the Act. The Respondent contests the allegation arguing that its agents acted properly, even laudably, with safety considerations in mind. There is insufficient evidence on this record to conclude that Wash or Sturgis or the two together

[52] As noted, supra, the General Counsel advanced the entire record as supporting his argument that the Respondent engaged in a course of conduct to rid itself of the Unions and the evidence in support of par. 17 of the complaint must be viewed in conjunction with that contention. I have considered this evidence in a light most favorable to the General Counsel for purposes of evaluating this argument. As noted above, I do not believe the Respondent was engaged in such a planned course or was deliberately managing bargaining events to create a pretext for eliminating union representation. I would hold to that view even were I do discredit each and every witness of the Respondent and credit each and every witness of the General Counsel and the Charging Parties as to the allegations of Sec. 17 of the amended complaint.

[53] See discussion in the remedy section, infra, of the need to present the notice language herein in a fashion that makes it clear to employees and the parties just what is particular conduct by particular employees was protected and not protected and what conduct violated and did not violate the Act.

determined to erect the signs simply as a pretext or vehicle for distancing the pickets from the workplace. Further, there is nothing in the erection of the signs which is inherently destructive of employee rights to picket. Indeed the pickets seem to have been singularly unpersuaded by the circumstances or the request that followed to move their picketing efforts. Under all the circumstances, I find that the General Counsel has failed to meet his burden of proof as to this allegation. Accordingly, I shall dismiss this subparagraph of the complaint.

IV. THE REPRESENTATION CASES—RESOLUTION OF CHALLENGES TO VOTERS[54]

Elections pursuant to Stipulated Election Agreements approved by the Regional Director were held in separate construction bargaining units on December 9, 1994 in Cases 28–RC–5256 involving the Teamsters, Case 28–RC–5257 involving the Operating Engineers, and Case 28–RC–5258 involving the Laborers. Over 200 ballots were challenged in these elections and the outcome of each election was dependent on the resolution of the challenged ballots in that election.

On January 9, 1995, the Regional Director issued an order of directing hearing on challenged ballots consolidating cases and notice ofhHearing in these three representation cases. That order did not resolve any of the challenged ballots, but rather referred all challenges to an administrative law judge for resolution in conjunction with the consolidated unfair labor practice allegations and directed that a report issue respecting the challenges to the elections in the three representation cases. Thereafter during the trial of the consolidated proceeding the parties submitted evidence, argument and various stipulations which have substantially reduced the challenged ballot matters in controversy. Certain findings on voter eligibility and the resolution of some of the challenged ballots, infra, refer to and incorporate my earlier findings respecting certain unfair labor practice matters, supra. The parties' stipulations respecting the representation cases also, in part, frame challenged ballot resolution agreements and voter eligibility questions on the basis of contentions in the unfair labor practice aspect of these consolidated proceedings.[55]

A. Preliminary Ruling Respecting Voting Eligibility of Certain Classes of Voters

In the cases of both the Laborers' construction unit election and the Teamsters' construction unit election, the voting eligibility of fired employees and their replacements are in contest. Generally the stipulations of the parties frame eligibility questions in terms of the legality of the firing of the original employee. Thus, the implicit assertions that appear, infra, if an employee was fired in violation of the Act he or she is eligible to vote herein and any replacement employee is not so eligible as well as the implicit corollary: if an employee was not fired in violation of the Act, he or she is not eligible to vote herein and any replacement is eligible to vote.[56]

As noted, supra, some employees who were fired for striking have been found improperly discharged and other employees who were fired for striking have been determined not to have been improperly discharged in this proceeding. All discharged strikers, including those not improperly or illegally fired, who returned to work during the strike have been held eligible to vote assuming other criteria of eligibility have been met. As discussed, supra, the Respondent made it clear it would rehire any or all the employees it discharged for striking. Some returned to the Respondent's employ; others continued to honor the strike. The only difference between the former employees who were fired, but who returned to work, and the former employees who were fired, but who declined to return to work and, rather, honored the legal unfair labor practice strike of the Laborers, is that the latter group chose to honor an unfair labor practice strike picket line or join in an unfair labor practice strike. Unfair labor practice strikers are eligible to vote. Are properly discharged employees who are offered reinstatement, but decline to return to work and rather honor the continuing Laborers and Operating Engineers unfair labor practice strikes, now actual or constructive unfair practice strikers or so akin to unfair labor practice strikers as to be eligible to vote?

Further, if the discharged employees who were offered reinstatement, but declined to cross the unfair labor practice strike picket lines, are to be treated as unfair labor practice strikers, should the new employees who replaced them be treated like new hires replacing unfair labor practice strikers, i.e., should the replacements be held to be ineligible to vote. The significance of these questions is very substantial for the Teamsters' unit challenges inasmuch as essentially all the employees were terminated on July 15 and their discharges have not been held to violate the Act. The discharged voters' ballots as well as their replacement voters' challenged ballots are at stake. The number of Laborers' unit challenges are also significant.

As noted, supra, in *Colonial Press, Inc*., 207 NLRB 673 (1973), enf. denied 509 F.2d 850 (8th Cir. 1975), cert. denied 423 U.S. 833 (1975), the Board held an employer's postdischarge offers of reemployment during a continuing strike made to strikers discharged for misconduct during an unfair labor practice, acted to convert through condemnation the terminated employees into unfair labor practice strikers. As noted, unfair labor practice strikers are eligible to vote in elections. Thus, if this doctrine is current representation case law, the challenged votes of former Petitioner-represented employees who were properly discharged, but thereafter were offered reemployment, but honored the unfair labor practice strike rather than return to work, should be eligible to vote in the election and the challenges to their ballots should be overturned. I further find that if the doctrine is good representation law, the replacements of

[54] As noted, above, I relied on the Respondent's payroll records and the parties' stipulations in resolving variant voter name spellings. Harmonization of the challenges as contained in the order directing hearing on challenged ballots and the parties' representation case stipulations made the recited numbers of the types of challenges made by each party in each representation case approximate.

[55] The parties' stipulations, entered into after substantial negotiation and preparation by counsel, implicitly acknowledge Board representation case law regarding voter eligibility. To the extent the stipulations frame issues of eligibility in terms of whether or not certain voters were proper replacement employees or were themselves employees, the parties clearly reached agreement on Board voter eligibility formulae and recommend those formulae to me for my adoption and application to the challenges. I find the standards implicitly adopted by the parties comport with Board law and therefore accept the voter eligibility questions as framed by the stipulations save where specifically noted.

[56] Employees hired to replace illegally discharged employees are not eligible to vote. *Roman Iron Works Corp*., 285 NLRB 1178 (1987); *Air Cargo International Corp.*, 245 NLRB 478, 501 (1979). The Board has long held that replacements hired for unfair labor practice strikers are not eligible to vote in a representation case election. *Larand Leiuselies*, 222 NLRB 838 (1976); *Tampa Sand & Materials Co.*, 137 NLRB 1549 (1962); *Lock Joint Tube Co.*, 127 NLRB 1146 (1960).

these discharged employees would not be eligible to vote in these elections and the challenges to their ballots should be sustained.

The Respondent, on brief, points out the contrary views of the Court panel majority denying enforcement in *Colonial Press*. This is not persuasive before me however, for administrative law judges are bound to follow Board precedent unless and until that precedent has been overturned by the Supreme Court or reconsidered by the Board. The Respondent further notes however that the Board may have changed its views as to this form of employer condemnation of discharged employees. See *White Oak Coal Co.,* 295 NLRB 567 (1989). That case however is not a clear reversal or modification of the *Colonial Press, Inc*. holding as it applies herein. Further, neither the case nor the broader doctrine is set forth in a representation case voter eligibility context.

Under all the circumstances, and despite the fact that the Board has recently noted the desirability of harmonizing unfair labor practice and representation case doctrines, see *O.E. Butterfield*, supra, I do not view the Board's *Colonial Press* decision as controlling of the voter eligibility questions at issue herein. The case is simply not so clear as to command substantial departure from traditional representation case law on its own without clearer authority for the propositions under consideration. Accordingly, I shall not apply the *Colonial Press* doctrine to the eligibility questions presented below. The eligibility of challenged voters who were either employees dismissed without violating the Act or replacements of those employees will be determined consistent with the apparent intentions of the stipulations of the parties.

B. Report on Challenged Ballots

1. Case 28–RC–5256—the Teamsters construction unit

Thirty-nine voters were challenged in the December 9 election respecting the drivers and truck mechanics and apprentices unit. Seventeen were challenged by the Employer on the ground that they were not employees. Twenty were challenged by the Petitioner Teamsters on the ground that they were not replacement employees. Two were challenged by the Board agent on the ground that their names were not listed on the election eligibility list.

a. The Teamsters' challenges

The parties stipulated that the eligibility of the ballots of the below listed individuals turned on whether or not they were lawful replacements. As I have found, above, the Teamsters' represented employees were not improperly discharged on July 15 for striking. Therefore the following individuals are not ineligible to vote because they replaced illegally discharged employees. Accordingly, I find them eligible to vote.

Barton, Bryan	Briggs, Jimmy
Burney, William	Byron, Christopher
Corrales, Joe	Figueroa, Henry
Freyenhagen, Lee	Gauthier, Richard
Gilmore, Martin	Lender, Dennis
Linegar, Larry	Martinez, Ramon
McCan, Lawrence	Montoya, Quirino
Moreno, Robert	Mosier Thomas W. III
Nelson, Christen	Ramon, William
Shumaker, Mark	Sipe, James
Stalcup, Raymond	Taylor, Charles
Wilson, James	

The Teamsters withdrew their objection to the ballot of Mr. Lawrence McCan and the parties stipulated he was eligible to vote.

The parties stipulated that a determination of the eligibility of voters Ron Dennee and James Michaels was not likely to be determinative of the election. They further stipulated that, if a determination of their eligibility should prove necessary after termination of the hearings, the parties requested that the Board refer these ballots back to the Regional Director for expeditious resolution.

b. The Employer's challenges

The parties stipulated that the eligibility of the below listed individuals to vote turned on whether or not they had been lawfully discharged for unprotected strike activities. As I have found, supra, that the Teamsters'-represented employees were not improperly discharged on July 15 for striking, I find these individuals were not eligible to vote.

Arter, Wayne	Bates, Paul
Carrasco, Mario	Fitzgerald, Maureen
Gillock, David	Green, George
Hightower, John	Hull, Dwain
Knipp, Kenneth R. Sr.	Medrano, Louis
Preston, Lloyd	Scott, Richard
Walker, Carlton	Wilson, Robert J.

The Employer withdrew its objection to the ballots of William Burney, Raymond Stalcup, and James Wilson and the parties stipulated these three individuals were eligible to vote.

c. The Board's challenges

The parties stipulated that challenged voters. Ramon Martinez and William Walton were in the same circumstances and would be controlled by the same analysis as that set forth above respecting replacements. Consistent with that analysis, I find Ramon Martinez and William Walton eligible to vote.

d. Summary of Teamsters unit challenged ballots

(1) Eligible voters—challenges overruled

The following 23 Teamsters unit voters were found eligible to vote. I recommend the challenges to their votes be overruled and their ballots be opened and counted:

Barton, Bryan	Briggs, Jimmy
Burney, William	Byron, Christopher
Corrales, Joe	Figueroa, Henry
Freyenhagen, Lee	Gauthier, Richard
Gilmore, Martin	Lender, Dennis
Linegar, Larry	Martinez, Ramon
McCan, Lawrence	Montoya, Quirino
Moreno, Robert	Mosier, Thomas W. III
Nelson, Christen	Ramon, William
Shumaker, Mark	Sipe, James
Stalcup, Raymond	Taylor, Charles
Wilson, James	

(2) Ineligible voters—challenges sustained

The following 14 Teamsters unit voters were found not eligible to vote. I recommend the challenges to their ballots be sustained.

Arter, Wayne	Bates, Paul

Carrasco, Mario	Fitzgerald, Maureen
Gillock, David	Green, George
Hightower, John	Hull, Dwain
Knipp, Kenneth R. Sr.	Medrano, Louis
Preston, Lloyd	Scott, Richard
Walker, Carlton	Wilson, Robert J.

(3) Challenges not resolved by agreement of the parties

The following two Teamsters' challenged ballots eligibility has not been determined but, in light of the parties stipulation, the issues as to these individuals should be deferred until, if necessary, following the counting of the ballots found eligible supra: Ron Dennee and James Michaels.

2. Case 28–RC–5257—the Operating Engineers construction unit

One hundred fifteen voters were challenged in the December 9 election respecting the equipment operators, servicemen, grade checkers, heavy equipment mechanics, and their apprentices unit. Thirty-three were challenged by the Employer on the ground that they were not employees. Sixty-seven were challenged by the Petitioner Operating Engineers on the ground that they were not replacement employees. Fifteen were challenged by the Board agent on the ground that their names were not listed on the election eligibility list.

a. The Operating Engineers' challenges

The parties stipulated that the eligibility of the below listed individuals to vote turned on whether or not they were lawful replacements. As I have found, above, that the Operating Engineers' represented employees were improperly discharged on July 15 for striking, these individuals are not replacements. Accordingly, I find them ineligible to vote.

Abeyta, Ernesto	Anderson, Cleo
Bejarano, Ray	Borquez, Francisco
Borquez, Victor	Bray, Greg
Canady, William	Carroll, Charles
Castano, Ernest	Clark, Douglas
Cole, Stewart	Crowe, Scott
Daugherty, Charles	Dodemont, Shayne
Fenn, Jason	Finch, Michael
Garcia, Richard	Henry, George III[57]
Glomski, Thomas	Granillo, Ernie
Guerro, Juan Jose	Herbert, David
S. Hernandez, Juan or John	Housler, Chad
Howard, William	Hughes, James
Jackson, Robert	Jackson, Charles
Jacobs, Rufus	Johnson, Chester
Johnson, Walter	Keith, Marion
Kirkendall, David	Mackey, Robert
Minor, Steve[58]	Moran, John
Moss, Brian	Nelson, Steven
Ochoa, Manuel	Paugh, Daniel
Powell, Ray	Pursley, Debra
Roe, Charles	Rose, Robert
Rossen, Frank	Shew, Michael
Sibley, Richard	Simmons, Stanley
Stock, Gary	Storm, George
Sturgis, Douglas	Turner, Kevin
Urschel, Charles	Wagner, Jim
Watson, Earl	Weber, John
Werland, David	Wetterstorm, Mark
Wilharm, Clinton	Wofford, Bill

Four of the individuals challenged by the Operating Engineers as unlawful replacements are in fact illegally discharged Operating Engineers' represented employees who returned to work. They are eligible to vote.

Dunham, Walter H.
Figueroa, Brent
Hernandez, Julius
Wells, Eddie

The parties stipulated that Brian Addington was an eligible voter. The parties further stipulated Ronald Dennee and James Sipe were not eligible voters in the equipment operators unit.

b. The Employer's challenges

The parties stipulated that the eligibility of the below listed individuals to vote turned on whether or not they had been lawfully discharged for unprotected strike activities. As I have found, above, that the Operating Engineers' represented employees were improperly discharged on July 15 for striking, I find these individuals are eligible to vote.

Arriaga, Juan	Bingham, Frederick
Casillas, Esgardo	Click, Scott
Cooper, Jon	Corrales, Richard
Cvitkovich, Dick	Dunham, Walter R.
Galloway, Eddie	Gustafson, Tom
Hunziker, Eugene	Jordan, Charlie
Marsteen, Stephen	Martinez, Florentino
McCormick, Kenneth	McCune, Larry
McNeely, Brian[59]	Mercer, Timothy
Mozinga, Danny	Musselman, Richard
Oliveres, Jose	Price, David
Romero, Juan	Sainz, Jerry
Scott, Kyle	Sierra, Pablo
Spelbring, Suzanne	Stubbins, George
Trivitt, James	Tynes, Gregory
Tynes, Teddy	

The parties stipulated that Bernard Bowman, was an eligible voter.

The following voters eligibility has not been determined but, in light of the parties stipulation, the issues as to these individuals should be deferred until, if necessary, following the counting of the ballots found eligible supra: Louis Hiltunen

[57] Henry George III was listed as challenged by the Petitioner Operating Engineers because he was not a proper replacement employee. George was not listed on the parties' stipulation addressing such challenges however. Inasmuch as I have found no Operating Engineers-represented employee properly terminated, no replacement employee in that unit has been found eligible to vote. Accordingly, George is also not eligible to vote.

[58] The order directing hearing on challenged ballots refers to Steve Munoz, the parties' representation stipulation and the Respondent's payroll records address Steve Minor.

[59] The order directing hearing on challenged ballots names Brian McNeely as a challenged voter, the parties' representation cases stipulation does not address his ballot. McNeely has been found to be an improperly discharged Operating Engineers-represented employee. He is therefore eligible to vote.

c. The Board's challenges

The Board agent challenged 15 voters because their names did not appear on the Employer's prepared eligibility list.

The parties stipulated that Frederico Bernal was an eligible voter. They also stipulated that individuals: Merrill Bowman, William Burkett, Peter Knagge, Paul B. Price III, Jeffrey Semrad, and Gerald Wilson were ineligible voters.

Jeff Wallen has apparently been at all times material engaged in work in the rock, sand, and gravel unit and is therefore not eligible to vote in the operator's construction unit. Daniel Quiroga and Beverly Kelley were each employed in the unit, but apparently with too few qualifying hours. In all events no party argues any of these individuals were eligible to vote. I shall therefore sustain the challenges to them.

Fred Weller was an improperly discharged striker and as such would be eligible to vote, if otherwise qualified. Indeed, the Employer's brief at 87 argues Weller should be held eligible to vote as a returned striker, yet the fact that his vote was challenged by the Board agent indicates Weller's name was not on the Employer's voter eligibility list as were the other discharged strikers found eligible to vote, supra. Under these circumstances, I find it appropriate to defer resolution of Weller's eligibility to vote, if necessary, following the counting of the ballots found eligible herein.

The following voters' eligibility have not been determined but, in light of the parties stipulation, the issues as to these individuals should be deferred until, if necessary, following the counting of the ballots found eligible above: Donald Garrett, Richard Lincoln, Kevin Sarrah, and Larry White.

d. Summary of Operating Engineers' unit challenged ballots

(1) Eligible voters—Challenges overruled

The following 38 Operating Engineers' unit voters were found eligible to vote and I recommend the challenges to their ballots be overruled and the ballots be opened and counted consistent with Board procedure.

Addington, Brian	Arriaga, Juan
Bernal, Frederico	Bingham, Frederick
Bowman, Bernard	Casillas, Esgardo
Click, Scott	Cooper, Jon
Corrales, Richard	Cvitkovich, Dick
Dunham, Walter H.	Dunham, Walter R.
Figueroa, Brent	Galloway, Eddie
Gustafson, Tom	Hernandez, Julius
Hunziker, Eugene	Jordan, Charlie
Marsteen, Stephen	Martinez, Florentino
McCormick, Kenneth	McCune, Larry
McNeely, Brian	Mercer, Timothy
Mozinga, Danny	Musselman, Richard
Oliveres, Jose	Price, David
Romero, Juan	Sainz, Jerry
Scott, Kyle	Sierra, Pablo
Spelbring, Suzanne	Stubbins, George
Trivitt, James	Tynes, Gregory
Tynes, Teddy	Wells, Eddie

(2) Ineligible voters—Challenges sustained

The following 71 Operating Engineers' unit voters were found ineligible to vote. I recommend the challenges to the ballots be sustained.

Abeyta, Ernesto	
Anderson, Cleo	
Bejarano, Ray	Borquez, Francisco
Borquez, Victor	Bowman, Merrill
Bray, Greg	Burkett, William
Canady, William	Carroll, Charles
Castano, Ernest	Clark, Douglas
Cole, Stewart	Crowe, Scott
Daugherty, Charles	Dennee, Ronald
Dodemont, Shayne	Fenn, Jason
Finch, Michael	Garcia, Richard
George, Henry III	Glomski, Thomas
Granillo, Ernie	Guerro, Juan Jose
Herbert, David	Hernandez, Juan or John S.
Housler, Chad	Howard, William
Hughes, James	Jackson, Robert
Jackson, Charles	Jacobs, Rufus
Johnson, Chester	Johnson, Walter
Keith, Marion	Kelley, Beverly
Kirkendall, David	Knagge, Peter
Mackey, Robert	Minor, Steve
Moran, John	Moss, Brian
Nelson, Steven	Ochoa, Manuel
Paugh, Daniel	Powell, Ray
Price, Paul	Pursley, Debra
Quiroga, Daniel	Roe, Charles
Rose, Robert	Rossen, Frank
Shew, Michael	Sibley, Richard
Simmons, Stanley	Simrad, Jeffrey
Sipe, James	Stock, Gary
Storm, George	Sturgis, Douglas
Turner, Kevin	Urschel, Charles
Wagner, Jim,	Wallen, Jeff
Watson, Earl	Weber, John
Werland, David	Wetterstorm, Mark
Wilharm, Clinton	Wilson, Gerald
Wofford, Bill	

(3) Challenges not resolved

The following six voters' eligibility has not been determined. I recommend that their ballots be remanded to the Regional Director for further investigation in the event the opening of the ballots found eligible herein is not determinative of the election.

Garrett, Donald
Hiltunen, Louis
Lincoln, Richard
Sarrah, Kevin
Weller, Fred
White, Larry

3. Case 28–RC–5258—The Laborers' construction unit

Fifty-two voters were challenged in the December 9 election respecting the laborers unit. Ten were challenged by the Employer on the ground that they were not employees. Twenty - nine were challenged by the Petitioner Laborers on the ground that they were not replacement employees. Thirteen voters were challenged by the Board agent on the ground that their names were not listed on the election eligibility list.

a. The Laborers' challenges

The following individuals were challenged by the Petitioner Laborers on the ground that they were not replacement employees:

Broughton, John	Dekens, Bryan
Gonzales, Enrique	Gradillas, Endurado
Green, Ronald	Hawkins, Logan
Hernandez, Tony	Huff, Chad
Lee, Jacob	Major, Rex
Newman, Paul	Nikitas, Angelo
Olivas, Miguel	Rau, Mardy
Sharp, Leroy	Sturgis, Chad
Tellez, Alfredo	Urbina, Jesus
Zilko, Mike	

The parties stipulated that the eligibility of the individuals challenged by the Laborers to vote turned on whether or not they were "lawful replacements." It is clear that the term used implicitly defines the replacements of not improperly fired employees as "lawful" and the replacement of illegally terminated employees as not "lawful." As noted, supra, this stipulation was easily applied to the employees represented by the Operating Engineers and the Teamsters. In light of the fact that I have found some Laborers' represented employees to have been properly discharged and others improperly discharged, the standard requires some elaboration. Given my findings respecting the discharges as set forth, supra, the replacements of the fourteen not improperly discharged Laborers'-represented employees otherwise meeting the eligibility formula are eligible voters and the replacements of the 10 improperly discharged Laborers'-represented employees and any other Laborers'-represented unfair labor practice strikers are not eligible to vote.

The Board in representation case voter eligibility questions turning on the status of replacement employees assigns the burden of proof to the employer "[b]ecause an employer is the party with superior access to the relevant information." *O. E. Butterfield, Inc.,* 319 NLRB 1004, 1006 (1995). Inasmuch as the same superiority of access to the relevant information applies here, I find that the Respondent bears the burden of proof in demonstrating that particular voters were replacements for legally terminated rather than illegally terminated or unfair labor practice striking Laborers' employees.

The record contains no evidence on the issue save employee payroll records. From these records it may be determined what units the properly discharged employees were terminated from and when and in what order "replacements" were hired in the laborer's construction unit at issue herein.

The records indicate that 10 of the 14 Laborers'-represented employees found not improperly discharged on July 15 may be fairly regarded as employed in the construction unit.[60] One of the remaining ten individuals, Chad Sturgis, returned to work on August 1 and is eligible to vote. Thus nine terminated laborer construction unit employees were properly fired and replaced by the Respondent and the new hired individuals who constituted their replacements and Sturgis are eligible to vote.

It seems logical to assume that the Respondent would replace employees in the order terminated.[61] Thus, the first replacement hired to work in the construction unit will be held to have replaced the first employee in the construction unit not improperly terminated. An examination of the Respondent's records regarding the hire of new laborers construction unit employees or the transfer of laborer's rock, sand, and gravel unit employees to construction unit work on and after July 28 allows the identification of the first nine laborers construction unit employees hired or transferred to do the work of the nine not improperly terminated laborer construction unit employees.[62] Including Sturgis, the eligible laborer's construction unit replacement employees are:

Broughton, John
Gonzales, Enrique
Hernandez, Tony
Huff, Chad
Lee, Jacob
Major, Rex
Newman, Paul
Rau, Mardy
Sturgis, Chad
Zilko, Mike

The remaining replacement employees challenged by the Laborers may fairly be construed to be replacements for the subsequently discharged Laborers'-represented employees. Since these individuals were found to be improperly discharged, above, their replacements are not eligible to vote. I therefore sustain the challenges to the following employees.

Dekens, Bryan
Green, Ronald
Gradillas, Eduardo
Hawkins, Logan
Nikitas, Angelo
Olivas, Miguel
Sharp, Leroy
Tellez, Alfredo
Urbina, Jesus

The Laborers originally challenged the following individuals, but thereafter stipulated that they were eligible voters:

Buckner, Roy
Escamillas, Jess
Gonzales, Joe
Granillo, Guillermo
Gresham, Jimmy
Jarvis, Justin
Padilla, Adalberto
Van Alstine, Ron

The following voters' eligibility has not been determined but, at the request of the parties, resolution of issues as to these individuals will be deferred until, if necessary, following the counting of the ballots found eligible, supra: Daniel S. Diaz and Ronnie Diaz.

[60] Florencio Trahin, Rubin Gallardo, Joel Gonzales, and Rodolfo Lugo for purposes of this analysis were rock, sand and gravel employees who would not have been replaced by newly hired members of the laborers construction unit.

[61] Cf. *Larand Leisurelies*, *Inc.*, 222 NLRB 838 (1976), for an order of hire analysis in a replacement context.

[62] Thus, for example, although Eduardo Gradillas was hired before Rex Major, Gradillas did rock, sand, and gravel unit work until a time after Major was hired for and commenced construction unit work. Therefore Major is held to have an earlier date of unit employment.

b. The Respondent's challenges

The following individuals were challenged by the Respondent on the ground that they were not employees:

Bailon, Mercedes
Chavez, Jose
Lopez, Guillermo
Lugo, Rudolfo
Mesa, Loreno[63]
Pedroza, Richard
Przyblski, Ken
Ruiz, Robert
Sanchez, Victor
Valdez, Carlos
Zengia, Francisco

The parties stipulated: "The question of whether the [challenged] individuals were not employees will be decided by the Board [in the instant consolidated proceeding]." Of the 11 individuals, 9: Messengers. Jose Chanez, Guillermo Lopez, Rodolfo Lugo, Laureano Meza, Kenneth Przybylski, and Roberto Ruiz,[64] Victor Sanchez, Carlos Valdez, and Francisco Zengia, were among the 14 Laborers'-represented employees found, above, to have been not improperly discharged on July 15. These nine individuals are therefore not eligible to vote and I shall sustain the challenges to their ballots.

The two remaining challenged individuals: Mercedes Bailon discharged on July 18 and Richard Pedrosa discharged on July 20, were found improperly discharged above. They are therefore eligible to vote in the election in all events and I shall overrule the challenges to their votes.

c. The Board's challenges

In addition to Loreno Mesa discussed above, the Board agent challenged the following individuals.

Dojaque, Zeferino
Camarena, Antonia
Diggins, Daniel
Esquivel, Hector Jr.
Esquivel, Hector Sr.
Jaramillo, Robert
Leal, Adalberto
Monge, Casimiro
Moreno, Frank
Pacheco, Richard
Valencia, Manual
Yebra, Juan

The parties stipulated the following individuals on this list were not eligible to vote: Antonio Camarena, Robert Jaramillo, Adelberto Leal, Casimiro Monge, Frank Moreno, Manual Valencia, and Juan Yebra.

The parties stipulated the following individuals on this list were eligible to vote: Daniel Diggins, Hector M. Esquivel Jr., Hector M. Esquivel Sr., Richard Pacheco, and Zeferino B. Dojaque.

d. Summary of Laborers unit challenged ballots

(1) Eligible voters—Challenges overruled

The following 25 Laborers' unit voters were found eligible to vote and I recommend the challenges to their ballots be overruled and the ballots be opened and counted consistent with Board procedure.

Bailon, Mercedes
Buckner, Roy
Dojaque. Zeferino
Esquivel, Hector M. Jr.
Gonzales, Enrique
Granillo, Guillermo
Hernandez, Tony
Jarvis, Justin
Major, Rex
Pacheco, Richard
Pedrosa, Richard
Sturgis, Chad
Zilko, Mike
Broughton, John
Diggins, Daniel
Escamillas, Jess
Esquivel, Hector M. Sr.
Gonzales, Joe
Gresham, Jimmy
Huff, Chad
Lee, Jacob
Newman, Paul
Padilla, Adalberto
Rau, Mardy
Van Alstine, Ron

(2) Ineligible voters—Challenges sustained

The following 25 Laborers unit voters were found ineligible to vote. I recommend the challenge of the ballots are be sustained.

Camarena, Antonio
Dekens, Bryan
Gradillas, Eduardo
Jaramillo, Robert
Lopez, Guillermo
Meza, Laureano
Moreno, Frank
Olivas, Miguel
Ruiz, Roberto
Sharp, Leroy
Urbina, Jesus
Valencia, Manual
Zengia, Francisco
Chanez, Jose
Green, Ronald
Hawkins, Logan
Leal, Adelberto
Lugo, Rodolfo
Monge, Casimiro
Nikitas, Angelo
Przybylski, Kenneth
Sanchez, Victor
Tellez, Alfredo
Valdez, Carlos
Yebra, Juan

(3) Challenges not resolved

The following two voters' eligibility has not been determined. I recommend that their ballots be remanded to the Regional Director for further investigation in the event the opening of the ballots found eligible herein is not determinative of the election.

Diaz, Daniel S.
Diaz, Ronnie

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes and policies of the Act including the posting of remedial notices.

The language of a notice is intended to inform employees and other interested individuals of the results of the litigation and to notify them of the actions to be taken by the respondent and the assurances given by the respondent respecting its future conduct. The notice should in no circumstances be ambiguous or misleading respecting the rights and obligations of employees and others under the Act and great care should be taken to

[63] Laureano Meza was challenged by the Board agent because his name was not on the eligibility list. Because he is one of the employees found properly discharged by the Respondent on July 15 and did not thereafter return to work, he is best considered as part of this group of challenged voters.

[64] Roberto Ruiz returned to work in 1995 after the December 9, 1994 election.

insure that the notice does not mislead or misrepresent the law or the litigation from which it resulted.

As set forth supra, the Respondent's conduct has been found to have violated the Act with respect to certain bargaining units and the employees employed therein. Similar, if not identical, conduct by Respondent has been found not to have violated the Act as to other bargaining units and the employees employed therein. In order to insure that readers of the notice do not misapprehend the somewhat elusive distinctions which produced the differences in results herein, the notice is somewhat longer and differently organized that the standard Board remedial notice for the types of violations found. Further inasmuch as the discharge of a substantial proportion of striking unit employees is of such a serious nature and strikes at the very heart of rights intended to be protected by the Act, it is appropriate to include a broad cease and desist order requiring the Respondent to cease and desist "in any manner" from infringing upon employee rights. *NLRB v. Entwistle Mfg. Co*., 120 F.2d 532, 536–537 (4th Cir. 1941). See also *Hickmont Foods*, 242 NLRB 1357 (1979).

In remedying the violations of Section 8(a)(3) and (1) found herein, I shall apply the teachings of the Board's decision in *Abilities & Goodwill*, Inc., 241 NLRB 27 (1979). Thus, the Respondent will be directed to offer its wrongfully terminated striking employees immediate reinstatement to their former positions discharging, if necessary, any replacements hired after the date of their unlawful discharges or, in the event those positions no longer exist, to substantially equivalent positions. Further the Respondent shall make each wrongfully discharged striker whole for any and all loss of earnings and benefits he or she may have suffered commencing at the time of his or her discharge, with interest. The make whole and interest provisions shall be calculated in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), and *Florida Steel Corp*., 231 NLRB 651 (1977); with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); see also *Isis Plumbing Co.*, 138 NLRB 716 (1962) , and will include the applicable remedies directed respecting the violations of Section 8(a)(5) and (1) of the Act, infra.

The Respondent shall be required to recognize the Operating Engineers and the Laborers with respect to the operators and laborers rock, sand and gravel units retroactively to the time recognition was improperly withdrawn. On request, the Respondent will meet and bargain with the Operating Engineers' and the Laborers' Unions respecting the two applicable rock sand and gravel units and, in the event an agreement is reached with respect to either or both units, shall sign the agreement or agreements.

Further the Respondent will be ordered to restore the status quo ante prevailing at the time of the wrongful withdrawal of recognition in the two rock, sand and gravel units and to rescind the unilateral changes it undertook in July 1994 and thereafter when it failed to continue the contracts' terms and conditions of employment respecting unit employees' wages, hours, and terms and conditions of employment; and to make all affected unit employees—including the employees in these two units found wrongfully discharged herein—whole for losses they incurred by virtue of the Respondent's unilateral changes in their wages, fringe benefits, and other terms and conditions of employment in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall fulfill its obligations to employee contractual benefit funds in the manner set forth in *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7 (1970), and shall reimburse its employees in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), for any expenses resulting from the Respondent's failure to make contractual payments.

CONCLUSIONS OF LAW

1. Respondent Granite Construction, Inc. is and has been at all relevant times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party Teamsters' Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Charging Party Operating Engineers' Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The Charging Party Laborers' Union is a labor organization within the meaning of Section 2(5) of the Act.

5. (a) At all relevant times, the Charging Party Operating Engineers' Union has been the exclusive representative for purposes of collective bargaining of the Respondent's employees in the following unit:

> All employees of the Respondent in the classifications referred to in Section 20 of the 1991–1994 Rock, Sand and Gravel Agreement between the Operating Engineers' Union and the Respondent, but excluding office clerical employees, and all guards and supervisors as defined in the Act.

(b) The unit described above in subparagraph (a) has at all times material been appropriate for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

6. (a) At all relevant times, the Charging Party Laborers' Union has been the exclusive representative for purposes of collective bargaining of the Respondent's employees in the following unit:

> All employees of the Respondent in the classifications referred to in Section 20 of the 1991–1994 Rock, Sand and Gravel Agreement between the Laborers' Union and the Respondent, but excluding office clerical employees, and all guards and supervisors as defined in the Act.

(b) The unit described above in subparagraph (a) has at all times material been appropriate for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

7. The Respondent violated Section 8(a)(1) of the Act by:

(a) Informing economic and unfair labor strikers who were not prohibited from striking by the terms of a current collective bargaining agreement that they had been or would be discharged for engaging in an illegal strike or would be if they did not return to work.

(b) Informing economic and unfair labor strikers who were not prohibited from striking by the terms of a current collective-bargaining agreement and who were at the time represented for purposes of collective bargaining by the Operating Engineers or the Laborers in the rock, sand, and gravel units described above, that the Respondent no longer recognized nor would continue bargaining with their union on their behalf.

(c) Informing economic and unfair labor strikers who were not prohibited from striking by the terms of a current collective bargaining agreement and who were at the time represented for purposes of collective bargaining by the Operating Engineers or the Laborers in the rock, sand, and gravel units described

above, that they would work under new terms and conditions of employment if they returned to work.

8. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging the following 73 Operating Engineers represented unit employees on July 15, 1994, because the employees were engaged in an economic strike against the Respondent:

Arriaga, Juan	Avila, Jose
Bingham, Frederick	Bowman, Bernard
Butler, Glen	Canady, William
Casillas, Esgardo	Click, Scott
Cooper, Jon	Corrales, Richard
Crosby, Mathew	Cvitkovich, Dick
DeLaOssa, Abel	Donald, Terry
Drake, John	Dunham, Walter H.
Dunham, Walter R.	English, Timothy
Figueroa, Richard	Galloway Eddie
George, David	Green, Lewis
Gustafson, Tom	Hancock, Kent
Hernandes, Julius	Hindman, Raymond
Horne, Rock	Hosterman, Stanley
Hulsey, Donald	Hunziker, Eugene
Iverson, Lester	Jacobs, Clinton
Jordan, Charlie F. Jr.	Jordan, Charlie F. Sr.
Marsteen, Stephen	Martinez, Florentino
McCormick, Kenneth	McCune, Larry
McDaniel, Bobby Joe	McDaniel, William
McNeeley, Brian	Mercer, John
Mercer, Timothy	Moody, Jeff
Mozingo, Dannie	Musselman, Richard
Olivares, Jose	Price, David
Radloff, Kenneth	Ramirez, Mike
Renteria, Alfredo	Roberts, Diane
Romero, Ernesto	Romero, Juan
Sainz, Jerry	Scott, Kyle
Scott, Ron	Sierra, Pablo
Sipe, Dennis	Spelbring, Suzzane
Stockbridge, Jeri	Stubbins, George
Sturgis, Douglas	Sullivan, Carol
Tolley, Thomas	Trivitt, James
Tynes, Gregory	Tynes, Teddy
Van Prooyen, Brent	Wallen, Jeff
Watson, Earl	Weller, Fred

9. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging the following 10 Laborers'-represented unit employees in the period July 18 through 25, 1994, because the employees were engaged in an unfair labor practice strike against the Respondent and because the employees, with the exception of Richard Pedrosa, honored the unfair labor practice strike of the Operating Engineers against the Respondent:

Arvayo, Ignacio	Bailon, Mercedes
Crater, Daniel	Enriquez, Jesus
Escalante, Jorge	Miranda, Richard
Pedrosa, Richard	Pete, James
Ripalda, Octavio	Spean, Rexson

10. The Respondent violated Section 8(a)(5) and (1) of the Act by engaging in the following acts and conduct.

(a) Respecting the Operating Engineers' representation of the employees in the Operators' rock sand and gravel unit set forth above.

(i) On July 19, 1994, withdrawing recognition of and at all time thereafter failing and refusing to recognize the Union as the exclusive representative of employees in the unit described above for purposes of collective bargaining.

(ii) At all times on and after July 19, 1994, failing and refusing to meet and bargain with the Union respecting unit employees.

(iii) At all times on and after July 19, 1994, unilaterally setting terms and conditions of employment for unit employees without notifying the Operating Engineers' Union or affording it an opportunity to bargain respecting such changes.

(b) Respecting the Laborers' representation of the Respondent's employees in the Laborers' rock, sand, and gravel unit set forth above.

(i) On July 26, 1994, withdrawing recognition of and at all time thereafter failing and refusing to recognize the Union as the exclusive representative of employees in the unit described above for purposes of collective bargaining.

(ii) At all times on and after July 26, 1994, failing and refusing to meet and bargain with the Union respecting unit employees.

(iii) At all times on and after July 26, 1994, unilaterally setting terms and conditions of employment for unit employees without notifying the Laborers' Union or affording it an opportunity to bargain respecting such changes.

11. The Respondent did not violate the Act as alleged in the complaint by engaging in the following conduct respecting its employees engaged in a strike prohibited by a current collective-bargaining agreement.

(a) Threatening the illegally striking employees with discharge or other adverse consequences if they did not abandon their illegal strike and return to work or establishing a construction zone to limit or move picketing employees from nearby the Respondents operations.

(b) Discharging the illegally striking employees

(c) Offering the illegally striking employees inducements to return to work.

12. The Respondent did not violate Section 8(a)(3) and (1) the Act by terminating Teamsters' and Laborers' represented employees striking in violation of the no-strike provisions of the contracts

13. The Respondent did not violate Section 8(a)(5) and (1) of the Act as alleged in the complaint by engaging in the following conduct.

14. (a) Withdrawing recognition from the Unions as exclusive representatives of the Respondent's three construction units and refusing to meet and bargain with the Unions regarding the construction units thereafter at a time when no collective-bargaining agreement covering the construction units was in effect.

(b) Withdrawing recognition of the Teamsters' Union as representative of its drivers rock, sand, and gravel unit and thereafter refusing to meet and bargaining with the Union respecting the unit because the union was engaged in an illegal strike and because the unit no longer had a substantial and representative compliment of employees after the discharge of striking employees on July 15.

(c) Unilaterally changing the terms and conditions of employment of its driver construction and rock, sand, and gravel bargaining units on and after July 26, 1994, without negotiating with the Teamsters' Union.

14. The above unfair labor practices constitute unfair labor practices effecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]